No. 91-1044

In The

Supreme Court of the United States

October Term, 1991

NEWPORT LIMITED, A PARTNERSHIP IN COMMENDAM,

Petitioner,

versus

SEARS, ROEBUCK & CO.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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I.
QUESTION PRESENTED

The question concerns the proper exercise of pendent jurisdiction:

Does an appellate court err by requiring a district court to exercise pendent jurisdiction over purely state law claims after all federal claims have been dismissed before trial, when diversity is not present, when all remaining claims are based on state law, when the law governing certain of the state law claims is unsettled, and when there is no federal policy or interest triggered by the litigation?

II.

LIST OF PARTIES

The parties are listed in the caption.

III.

TABLE OF CONTENTS

Page(s)

I. QUESTION PRESENTED i

II. LIST OF PARTIES ii

III. TABLE OF CONTENTS iii

IV. TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

Opinions Below 1

Jurisdictional Grounds 2

Statutory Provisions 2

Statement of the Case 3

1. The Jurisdictional Dispute 3

2. The Underlying Litigation 5

Reason for Granting the Writ 6

THE FIFTH CIRCUIT'S DECISION, WHICH ORDERS A DISTRICT COURT TO EXERCISE PENDENT JURISDICTION OVER STATE LAW CLAIMS AFTER ALL FEDERAL CLAIMS HAVE BEEN DISMISSED BEFORE TRIAL, CREATES A CONFLICT AMONG THE CIRCUITS REGARDING THE PROPER EXERCISE OF PENDENT JURISDICTION AND IS INCONSISTENT WITH THE PRINCIPLES OF COMITY AND FEDERALISM UNDERLYING THIS COURT'S DECISION IN *GIBBS* 6

CONCLUSION 14

APPENDICES

Newport Limited v. Sears, Roebuck & Co., 941 F.2d 302 (5th Cir. 1991) A-1

Newport Limited v. Sears, Roebuck & Co., 946 F.2d 893 (5th Cir. 1991) (denial of rehearing) A-16

III.

TABLE OF CONTENTS – Continued

Page(s)

Newport Limited v. Sears, Roebuck & Co., 739 F. Supp. 1078 (E.D. La. 1990).....A-18

Newport Limited v. Sears, Roebuck & Co., United States District Court, Civil Action No. 86-2319, Minute Entry (March 28, 1989).....A-33

Newport Limited v. Sears, Roebuck & Co., United States District Court, Civil Action No. 86-2319, Minute Entry (April 9, 1990).....A-35

Newport Limited v. Sears, Roebuck & Co., United States District Court, Civil Action No. 86-2319, Statement Regarding Citizenship filed by Newport Limited (April 16, 1990).....A-36

Judgment of Civil District Court for the Parish of Orleans, State of Louisiana, *Newport Limited v. Sears, Roebuck & Co.*, No. 90-10478 (May 22, 1991).....A-42

IV.
TABLE OF AUTHORITIES

Page(s)

CASES:

Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663 (7th Cir. 1986) 9

Berg v. First State Ins. Co., 915 F.2d 460 (9th Cir. 1990) 9

Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc., 781 F.2d 604 (7th Cir. 1986) 10, 11

Carden v. Arkoma Associates, 494 U.S. 185 (1990) 3, 4

Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988) 7

Danner v. Himmelfarb, 858 F.2d 515 (9th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989) 9

Dezell v. Day Island Yacht Club, 796 F.2d 324 (9th Cir. 1986) 12

Edwards v. First National Bank, 872 F.2d 347 (10th Cir. 1989) 10

Grano v. Barry, 733 F.2d 164 (D.C. Cir. 1984) 12

Hagans v. Lavine, 415 U.S. 528 (1974) 7

Hassett v. LeMay Bank & Trust Co., 851 F.2d 1127 (8th Cir. 1988) 10

Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556 (2d Cir. 1991), *cert. denied*, 111 S. Ct. 2829 (1991) 11, 12

Lovell Mfg. v. Export-Import Bank, 843 F.2d 725 (3rd Cir. 1988) 9

Mayer v. Oil Field Systems Corp., 803 F.2d 749 (2d Cir. 1986) 10, 11

IV.

TABLE OF AUTHORITIES – Continued

Page(s)

Moor v. County of Alameda, 411 U.S. 693 (1973) 12

Moses v. Kenosha County, 826 F.2d 708 (7th Cir. 1987) 8

Newport Limited v. Sears, Roebuck & Co., 739 F. Supp. 1078 (E.D. La. 1990) 1, 4

Newport Limited v. Sears, Roebuck & Co., 941 F.2d 302 (5th Cir. 1991), *reh'g denied*, 946 F.2d 893 (Sept. 24, 1991) 1, 5, 8

Nolan v. Meyer, 520 F.2d 1276 (2d Cir.), *cert. denied*, 423 U.S. 1034 (1975) 13

Rice v. Branigar Organization, Inc., 922 F.2d 788 (11th Cir. 1991) 8, 9

Rosado v. Wyman, 397 U.S. 397 (1970) 7

Schneider v. TRW, Inc., 938 F.2d 986 (9th Cir. 1991) 11

Shaffer v. Board of School Directors, 730 F.2d 910 (3rd Cir. 1984) 12

United Mine Workers v. Gibbs, 383 U.S. 715 (1966) 1, 4, 7, 13

Weaver v. Marine Bank, 683 F.2d 744 (3d Cir. 1982) 11

Williams v. City of River Rouge, 909 F.2d 151 (6th Cir. 1990) 10

CONSTITUTION:

Article III, section 2 2

IV.

TABLE OF AUTHORITIES – Continued

Page(s)

STATUTES:

18 USC § 1961 3

28 USC § 1254(1) 2

28 USC § 2101(c) 2

MISCELLANEOUS:

Federal Rule of Civil Procedure 12(b)(6) 3

Supreme Court Rule 20 2

PETITION FOR A WRIT OF CERTIORARI

Newport Limited, A Partnership In Commendam ("Newport") respectfully petitions this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit requiring the district court to retain jurisdiction over Newport's state law claims. The district court properly declined to exercise pendent jurisdiction over those claims after dismissing the only federal claim in the case, and Newport would strongly prefer to litigate the state claims in state court, where it can receive a "surer-footed reading of applicable law." *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 1139 (1966). Although the Fifth Circuit purported to rely upon *Gibbs*, its decision is inconsistent with the principle of *Gibbs* and flatly conflicts with rulings of other circuits.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit ("court of appeals") is reported as *Newport Limited v. Sears, Roebuck & Co.*, 941 F.2d 302 (5th Cir. 1991), *reh'g denied*, 946 F.2d 893 (Sept. 24, 1991). A-1; A-16.[1] The district court's opinion is reported as *Newport Limited v. Sears, Roebuck & Co.*, 739 F. Supp. 1078 (E.D. La. 1990). A-18.

[1] References to "A-___" are to the Appendix submitted with this Petition.

JURISDICTIONAL GROUNDS

The court of appeals entered its ruling on August 26, 1991, and the panel denied rehearing on September 24, 1991. A-1; A-16. This petition for a writ of certiorari was filed within 90 days of September 24, 1991, as required by 28 U.S.C. § 2101(c) and Supreme Court Rule 20. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

This petition involves the principle of pendent jurisdiction, which is derived from Article III, section 2 of the United States Constitution:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

No statutory provisions are at issue in this petition.

STATEMENT OF THE CASE

1. The Jurisdictional Dispute

Newport instituted this action against Sears, Roebuck and Co. ("Sears") in June 1986, alleging violations of Louisiana law. Jurisdiction was founded solely on diversity of citizenship. Two years later, Newport amended its complaint to assert additional state law claims, as well as a claim for violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"). Thus, by late 1988, jurisdiction was founded on the presence of a federal question, on the principle of pendent jurisdiction, and on diversity of citizenship.

In November 1988, shortly after addition of the RICO claim, Sears moved to dismiss that claim pursuant to Federal Rule of Civil Procedure 12(b)(6).[2] In February 1989, three months later, but before the district court had ruled on the motion to dismiss, Sears moved for summary judgment on the RICO claim. Near the end of March, the district court stayed further proceedings, noting that it did not believe the requirements for a RICO claim were "sufficiently settled in the Fifth Circuit at this time." A-33. That stay remained in effect for more than a year.

In the interim, this Court issued its opinion in *Carden v. Arkoma Associates*, 494 U.S. 185 (1990), reversing a decision of the Fifth Circuit and holding that, for diversity

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[2] Because this writ application raises only a jurisdictional issue, the various motions, memoranda, and exhibits on the merits are not reproduced in the appendix.

purposes, citizenship of a limited partnership is determined by the citizenship of all partners, rather than the citizenship of the general partners alone. On April 9, 1990, the district court, without lifting the stay, ordered Newport to file a statement as to citizenship of the parties under the rule of *Carden*. A-35. Accordingly, on April 16, Newport advised the district court that one of its limited partners was a citizen of New York, the state of Sears' incorporation, that diversity did not exist, and that the basis of jurisdiction was the presence of a federal question of law raised by the RICO claim. A-36.

On May 21, 1990, the district court ruled that the parties were not diverse under the rule announced in *Carden*. *Newport*, 739 F. Supp. at 1084. On that same date, the district court granted Sears' motion to dismiss or for summary judgment on the RICO claim. Citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966), the district court then properly declined to exercise federal jurisdiction over the pendent state law claims. *Id.*

Newport immediately instituted a state court proceeding. *Newport Limited, A Partnership in Commendam v. Sears, Roebuck & Co.*, Docket No. 90-10478, Civil District Court for the Parish of Orleans, State of Louisiana. To avoid undue expense and duplication of effort, and to promote judicial economy, the state court ordered that all discovery taken in the federal proceeding could be used as though taken in the state case. A-42.

Sears appealed the district court's determination that diversity did not exist, as well as its decision not to exercise pendent jurisdiction. Newport appealed the dismissal of its RICO claim. On August 26, 1991, the court of

appeals affirmed both the dismissal of the RICO claim and the determination that diversity jurisdiction did not exist. *Newport*, 941 F.2d at 303. The appellate court, however, reversed the district court's refusal to retain pendent jurisdiction, concluding that the trial court had abused its discretion – even though no basis for federal jurisdiction remained and all issues sounded exclusively in state law. *Id.* at 307-08.

2. The Underlying Litigation

Because the only issue raised by Newport is the Fifth Circuit's order compelling the district court to exercise federal power, Newport will not belabor the Court with a detailed recitation of the facts supporting its various state law claims. The litigation arises out of a binding agreement that was signed by the parties in January of 1985 expressing their mutual consent to a lease by Sears of a 650,000 square foot warehouse facility. Newport agreed to construct the warehouse for Sears, according to Sears' specifications, at a new industrial development site owned by Newport.

Approximately nine months later, Sears decided that it did not need a new warehouse facility at that location. Sears decided not to advise Newport of its change of plans, opting instead to engage in a pattern of misrepresentations. Newport was not aware that Sears' representations were inaccurate, and believed that Sears was acting in good faith. Newport therefore continued construction and related ground work for the initial stages of the development. As Newport prepared to put warehouse construction out for bid, however, Sears refused to

provide necessary construction information and refused to proceed with further documentation on terms consistent with its earlier agreement. As a result of Sears' fraudulent misrepresentations and its failure to comply with the agreement, the entire Newport development was crippled. Newport incurred millions of dollars in damages and ultimately was forced into bankruptcy.

REASON FOR GRANTING THE WRIT

THE FIFTH CIRCUIT'S DECISION, WHICH ORDERS A DISTRICT COURT TO EXERCISE PENDENT JURISDICTION OVER STATE LAW CLAIMS AFTER ALL FEDERAL CLAIMS HAVE BEEN DISMISSED BEFORE TRIAL, CREATES A CONFLICT AMONG THE CIRCUITS REGARDING THE PROPER EXERCISE OF PENDENT JURISDICTION AND IS INCONSISTENT WITH THE PRINCIPLES OF COMITY AND FEDERALISM UNDERLYING THIS COURT'S DECISION IN *GIBBS*.

The Fifth Circuit has deprived Newport of the opportunity to have Newport's state law claims decided by a state court. The Fifth Circuit held that, because of the length of the federal proceeding and the amount of judicial resources devoted to it, the district court abused its discretion by declining to retain jurisdiction over the state claims, even though the district court had dismissed the only federal claim prior to trial. That ruling undermines principles of federalism and comity by requiring the needless exercise of federal power over a dispute that is being litigated in state court. The Fifth Circuit stands alone. Other circuit courts have held that, while a district court may exercise pendent jurisdiction in similar cases, it is not required do so. One circuit court has even held that

a district court must decline to exercise pendent jurisdiction in such cases. This Court should grant the writ and resolve the clear conflict among the circuits by reversing the Fifth Circuit's ruling.

When federal claims are dismissed before trial, the oft-quoted language of this Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), provides clear guidance to district courts:

> Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.
>
> *Id.* at 726.

"[T]he rationale of *Gibbs* centers upon considerations of comity and the desirability of having a reliable and final determination of the state claim by state courts having more familiarity with the controlling principles and the authority to render a final judgment." *Hagans v. Lavine*, 415 U.S. 528, 548 (1974).

Gibbs, however, "does not establish a mandatory rule to be applied inflexibly in all cases." *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 n.7 (1988). While a district court *may* exercise pendent jurisdiction after dismissing all federal claims in limited situations,[3] whether

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[3] *See, e.g., Rosado v. Wyman*, 397 U.S. 397, 404 (1970) (district court *may* exercise pendent jurisdiction where the remaining state law claims implicate an important federal interest);

(Continued on following page)

and when a district court *must* exercise pendent jurisdiction after dismissing all federal claims is unclear. The circuit courts now are split on that issue, and this case provides the Supreme Court with an excellent vehicle for resolving the dispute.

Here, the Fifth Circuit held that dismissal of the pendent claims was an abuse of discretion because the parties had taken extensive discovery and because "four years of litigation produced 23 volumes and thousands of pages of record." *Newport*, 941 F.2d at 307. The court then added:

> None of the *Gibbs* factors – judicial economy, convenience, fairness, and comity – would be offended by the exercise of pendant jurisdiction after dismissal of the federal claim; indeed, judicial economy and convenience, state and federal, and a conscious regard for the ultimate interests of the litigants, counsel strongly in favor of the retention of jurisdiction.
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> *Id.* at 308.

In so ruling, the Fifth Circuit compelled the district court to exercise federal jurisdiction unnecessarily, despite the fact that Newport was actively proceeding with its state court suit.

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Rice v. Branigar Organization, Inc., 922 F.2d 788, 792 (11th Cir. 1991) (district court *may* exercise pendent jurisdiction when no state forum is available to litigate remaining state law claims); *Moses v. Kenosha County*, 826 F.2d 708, 711 (7th Cir. 1987) (district court *may* exercise pendent jurisdiction where substantial judicial resources have been committed to the case and dismissal would cause a substantial duplication of effort by another court).

That ruling clearly conflicts with *Rice v. Branigar Organization, Inc.*, 922 F.2d 788 (11th Cir. 1991), in which the Eleventh Circuit held that, when all federal claims are dismissed before trial, a district court "can abuse its discretion . . . only by dismissing the pendent claims when no state forum is available." *Id.* at 792. In fact, until the ruling here, no circuit court had held that a district court "must exercise jurisdiction over pendent state claims whenever there have been lengthy pretrial proceedings." *Danner v. Himmelfarb*, 858 F.2d 515, 524 (9th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989).

Numerous other circuit courts have found no abuse of discretion when a district court declined to exercise pendent jurisdiction after the parties had engaged in extensive discovery and the court had devoted substantial resources to the case. For example, in *Berg v. First State Ins. Co.*, 915 F.2d 460 (9th Cir. 1990), state issues predominated and the sole federal claim was dismissed on summary judgment two years after suit was filed. The Ninth Circuit held: " '[T]he proper exercise of discretion *requires* dismissal of the state claim[s]' " *Id.* at 468 (citation omitted) (emphasis supplied). Similarly, in *Lovell Mfg. v. Export-Import Bank*, 843 F.2d 725 (3rd Cir. 1988), where the federal claims were dismissed on summary judgment following an appeal, a remand, and discovery, the Third Circuit declared: "[O]nce all federal claims have been dropped from a case, the case simply does not belong in federal court."[4]

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[4] *See also Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 682 (7th Cir. 1986) (where federal

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Proper respect for the adjudicatory authority of state courts requires reversal of the Fifth Circuit. The continued exercise of pendent jurisdiction after all federal claims have been dismissed is an unusual and extraordinary exercise of federal power over a purely local matter. *Newport v. Sears* implicates no federal interest whatsoever. Absent the RICO claim, the litigation is a dispute over an agreement to construct and lease a warehouse facility in Orleans Parish, Louisiana. Much of the wrongful conduct occurred in New Orleans, and all of the damage was sustained there. Newport's remaining claims are solely based on provisions of the Civil Code of Louisiana and various other state statutes. The district court was understandably hesitant to exercise its power unnecessarily to resolve such a purely local dispute.

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claims dismissed on summary judgment after discovery, "the state claims should be dismissed without prejudice almost as a matter of course"); *Mayer v. Oil Field Systems Corp.*, 803 F.2d 749, 757 (2d Cir. 1986) (where federal claims dismissed on summary judgment after one appeal, remand and discovery, refusal to retain pendent jurisdiction was appropriate because "plaintiff's federal claims [were] without sufficient merit to require a trial"); *Williams v. City of River Rouge*, 909 F.2d 151, 157 (6th Cir. 1990) (pendent jurisdiction properly declined where federal claim was dismissed on summary judgment after discovery); *Edwards v. First National Bank*, 872 F.2d 347, 352 (10th Cir. 1989) (pendent jurisdiction properly declined where RICO claim dismissed on summary judgment after "[e]xtensive discovery"); *Hassett v. LeMay Bank & Trust Co.*, 851 F.2d 1127 (8th Cir. 1988) (pendent jurisdiction properly declined where federal claims dismissed on summary judgment). *Cf. Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604, 612 (7th Cir. 1986) (district court's retention of pendent jurisdiction reversed where federal claim decided on summary judgment).

The court of appeals ignored considerations of comity and held instead that dismissal of the pendent claims was an abuse of discretion because of the length and cost of the proceedings in the district court. Throughout the exercise of pretrial jurisdiction, however, the federal district court never determined the substantive merits of Newport's state law claims. What's more, even if the district court had done so, mere time invested in litigating state claims "is an insufficient reason to sustain the exercise of pendent jurisdiction." *Weaver v. Marine Bank*, 683 F.2d 744, 746 (3d Cir. 1982). *See also Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 564 (2d Cir.) (judicial economy "should not be the controlling factor"), *cert. denied*, 111 S. Ct. 2829 (1991).

Nor does extensive discovery by the parties favor exercise of pendent jurisdiction where, as here, the discovery taken in the federal suit already has been deemed applicable to and available for use in the pending state court proceeding. The state court thus has prevented any duplication of judicial resources and any inconvenience or inefficiency for the parties. *See Mayer v. Oil Field Systems Corp.*, 803 F.2d 749, 757 (2d Cir. 1986); *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604, 612 (7th Cir. 1986). The "hundreds of Court hours" devoted to this matter by the district judge, 941 F.2d at 308, merely underscore the degree of deference that should be accorded his determination not to exercise pendent jurisdiction once the sole federal claim had been dismissed. *Cf. Schneider v. TRW, Inc.*, 938 F.2d 986, 994 (9th Cir. 1991) ("Supreme Court and Ninth Circuit precedent teaches us that the

district court is in the best position to judge the extent of resources invested in a case").

The court of appeals acknowledged that all "matters remaining in this lawsuit are solely questions of state law," yet declared that "they present no novel or especially unusual questions." 941 F.2d at 308. This Court has held that a district court may refuse to exercise pendant jurisdiction if, among other things, that court would have " 'to resolve difficult questions of [state] law upon which state court decisions are not legion' " *Moor v. County of Alameda*, 411 U.S. 693, 715-16 (1973) (citation omitted). Several circuit courts have held that a district court abuses its discretion by deciding unsettled issues of state law in a case that involves no federal issues. *E.g., Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 564 (2d Cir. 1991); *Dezell v. Day Island Yacht Club*, 796 F.2d 324, 329 (9th Cir. 1986); *Grano v. Barry*, 733 F.2d 164, 169 (D.C. Cir. 1984); *Shaffer v. Board of School Directors*, 730 F.2d 910, 911-13 (3rd Cir. 1984).

Here, the Fifth Circuit had no basis for even considering the state law claims, let alone concluding that those claims are neither novel nor unusual under Louisiana law. Newport's state law claims were not the subject of either the district court's ruling or the appeal to the Fifth Circuit. From the very start of this litigation, the parties have vigorously disagreed over the scope of Louisiana law as to the following issues:

- Whether, under the Civil Code of Louisiana, the parties executed a binding contract;

- Whether a binding contract is a prerequisite for claims of detrimental reliance and intentional misrepresentation;

- Whether a special relationship akin to one of trust and confidence must exist before liability may be established for negligent misrepresentation;

- Whether damages for lost profits are recoverable by an entity with no history of operations but which has compelling grounds for determining lost profits based on comparable business operations; and

- Whether damages for lost profits are recoverable for claims of detrimental reliance.

Other complex state law issues are certain to arise during the trial of this matter. This is a hotly-contested commercial suit involving a myriad of factual issues and disputed claims, and a "surer-footed reading of applicable law" can be procured from a Louisiana state court. *Gibbs*, 383 U.S. at 726.

For more than a year, Newport's claims have been litigated in state court. Discovery taken in the federal suit can be used as though taken in the state action, and the trial of Newport's claims to a jury will consume equivalent judicial resources in either state or federal court. The state court is familiar with the issues and evidence, and Sears will suffer no prejudice if purely state claims are advanced for trial in the state judicial system. *See Nolan v. Meyer*, 520 F.2d 1276, 1280 (2d Cir.), *cert. denied*, 423 U.S. 1034 (1975).

CONCLUSION

The considerations of judicial economy, convenience, fairness, and comity underpinning the principle of pendent jurisdiction all dictate that the lower court did not abuse its discretion. The sole federal claim based on RICO was filed late in the proceeding; once the federal claim was dismissed prior to trial the case ceased to raise any federal question or implicate any federal interest. The district court correctly declined to exercise pendent jurisdiction over the only claims remaining, all of which were state claims. Comity and federalism, as well as the need for consistent rulings in all federal circuits on the exercise of pendent jurisdiction, require reversal of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

Newport Limited v. Sears, Roebuck & Co., 941 F.2d 302 (5th Cir. 1991) A-1

Newport Limited v. Sears, Roebuck & Co., 946 F.2d 893 (5th Cir. 1991) (denial of rehearing) A-16

Newport Limited v. Sears, Roebuck & Co., 739 F.Supp. 1078 (E.D. La. 1990) A-18

Newport Limited v. Sears, Roebuck & Co., United States District Court, Civil Action No. 86-2319, Minute Entry (March 28, 1989) A-33

Newport Limited v. Sears, Roebuck & Co., United States District Court, Civil Action No. 86-2319, Minute Entry (April 9, 1990) A-35

Newport Limited v. Sears, Roebuck & Co., United States District Court, Civil Action No. 86-2319, Statement Regarding Citizenship filed by Newport Limited (April 16, 1990) A-36

Judgment of Civil District Court for the Parish of Orleans, State of Louisiana, *Newport Limited v. Sears, Roebuck & Co.*, No. 90-10478 (May 22, 1991) A-42

NEWPORT LIMITED, A Partnership in Commendam, Plaintiff-Appellee Cross-Appellant,

v.

SEARS, ROEBUCK AND CO., Defendant-Appellant Cross-Appellee.

No. 90-3559.

United States Court of Appeals, Fifth Circuit.

Aug. 26, 1991.

Rehearing and Rehearing En Banc Denied Sept. 24, 1991.

Harry McCall, Jr., Paul A. Nalty, Jonathan C. McCall, Rebecca A. Stulb, W. Anthony Toups, III, Charles P. Blanchard, Chaffe, McCall, Phillips, Toler & Sarpy, New Orleans, La., for defendant-appellant cross-appellee.

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Appeals from the United States District Court for the Eastern District of Louisiana

Before REAVLEY, POLITZ, and JOLLY, Circuit Judges.

POLITZ, Circuit Judge:

Newport Limited, a Louisiana partner-ship in commendam, brought suit against Sears, Roebuck and Co.

alleging civil RICO violations, state-law fraud, and unfair trade practice claims. The district court dismissed the RICO Claim and, declining to exercise pendent jurisdiction, dismissed without prejudice the state-law claims. *Newport Ltd. v. Sears, Roebuck & Co.*, 739 F.Supp. 1078 (E.D.La.1990). In a brief ruling after oral argument we affirmed the dismissal of the RICO claim but reversed the decision to decline to hear the state-law claims. 937 F.2d 605 (5th Cir.1991) (Table). We now assign reasons for that ruling and address the remaining issues.

Background

The facts surrounding this litigation are detailed in the district court opinion; we relate only those facts pertinent to today's disposition. Newport owned a large tract of land in New Orleans suitable for industrial development. It hoped to make Sears its first – and centerpiece – tenant by constructing and leasing to Sears a warehouse facility. The parties began negotiations in the fall of 1983 regarding such items as the size of the warehouse and the annual rental per square foot; they differ as to the details actually agreed upon. Newport was to handle the local and federal regulatory requirements, including applications for urban development grants. In a November 1984 letter, and in a January 9, 1985 "duplication" of that earlier letter, the parties agreed to agree:

> It is understood that the matters contained in this letter will form the basis of a much more detailed document, the terms and conditions of which are subject to the mutual agreement of the parties. It is not intended to be a comprehensive statement of our respective rights, duties

and obligations which will be fully set forth in said document.

In the succeeding 18 or so months no more specific agreement was reached. Newport insists this failure was the result of a calculated strategy by Sears representatives to withdraw from the transaction because of a perceived change in its warehousing needs. This strategy purportedly was guided by a four-option memorandum drafted by Sears' in-house counsel, D. Charles Houk, the gist of which was to stonewall so staunchly during negotiations, and to provide such minimal technical assistance, that Newport, rather than Sears, would lose interest and eventually withdraw from the project, taking the blame for its collapse.

Sears indicates that after a change in corporate leadership some of its priorities changed, but that it was still willing to continue the project in some form, albeit with some delay. According to Sears, the project collapsed because of Newport's resistance to changes, general uncooperativeness, and unrealistic expectations. The parties also disagree on whether a $2.48 per square foot per annum lease rate was agreed upon as a fixed rate or as a platform for adjustment based on unspecified formulae.

Newport filed suit in June 1986, asserting diversity of citizenship as the basis for jurisdiction. According to Sears, the lawsuit came without any warning or notice that the negotiations had terminated. As finally amended Newport's complaint alleged a RICO violation, together with Louisiana law claims of failure to perform in good faith and violation of the state Unfair Trade Practices and Consumer Protection Law. Sears moved to dismiss the

RICO claim and sought summary judgment on the state-law claims; Newport responded to both motions. the district court dismissed the RICO claim on the merits and dismissed without prejudice the pendent state claims, ruling that in light of the Supreme Court's recent decision in *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990), there was no diversity jurisdiction because Sears' state of incorporation, and the domicile of one of Newport's limited partners, was New York.[1] Both sides timely appealed.

Analysis

We first address and summarily dispose of the RICO claim. Newport's efforts to apply RICO to the instant commercial dispute are fatally defective. We adopt as our own the insightful holding of the district court on this

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[1] The limited partner of Newport sharing New York residency with Sears' place of incorporation, the estate of Townsend Martin, has two executors, one of whom is a corporation incorporated and with a principal place of business in New Jersey; the other is an individual who is a citizen of the State of New York. The citizenship of a legal representative of an estate, while a statutorily-settled matter of law for cases commenced on or after November 19, 1988, was equally clear with respect to executors well before the recent amendment to 28 U.S.C. § 1332(c)(2). 6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* § 1556 (1990) ("As a result of looking to the citizenship of the real party in interest and because of the express references to them in the second sentence of Rule 17(a), federal courts have held that the citizenship of an executor, administrator, guardian, bailee, or trustee is determinative in measuring the court's jurisdiction.") (footnotes omitted).

issue. We must address, however, the issue of diversity jurisdiction and the propriety of the refusal to hear the pendent claims.

Sears vigorously contends that the trial court erred in concluding that there was no diversity between Sears and Newport. Sears' contention focuses on *Carden's* discussion of *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 53 S.Ct. 447, 77 L.Ed. 903 (1933), and *United Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965). *Carden* reversed a holding by this court that an Arizona limited partnership is considered for diversity purposes as residing only in the place of residence of its general partners. In reversing, the Supreme Court grouped all partnerships under the unincorporated association rubric and looked to the residence of all partners, general and limited, in determining diversity jurisdiction.

In the earlier *Russell* case, the Supreme Court had accorded a different treatment to the entity under Puerto Rican law known as a *sociedad en comandita*,[2] which it deemed more closely analogous to a corporation than to a common-law partnership and thus viewed it, "for purposes of federal jurisdiction [no differently] than a corporation organized under that law." 288 U.S. at 482, 53 S.Ct. at 449, 77 L.Ed. at 908. The Court's theory was concisely stated by Justice Stone:

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[2] The Court was actually determining an issue respecting removability of a suit against a *sociedad* from the insular court to the United States District Court for Puerto Rico. Nonetheless, Carden considered the case relevant for purposes of determining diversity jurisdiction. 494 U.S. at ___ n. 2, 110 S.Ct. at 1019 n. 2, 108 L.Ed. 2d at 165 n. 2.

> The tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnerships. the tradition of the civil law, as expressed in the Code of Puerto Rico, is otherwise. Therefore to call the *sociedad en comandita* a limited partnership in the common law sense, as the respondents and others have done, is to invoke a false analogy. In the law of its creation the *sociedad* is consistently regarded as a juridical person. In may contract, own property and transact business, sue and be sued in its own name and right.

Id. at 481, 53 S.Ct. at 448-49, 77 L.Ed. at 907-08.[3] The Court then listed additional characteristics of the *sociedad* akin to traditional aspects of the corporation and its relationship to its stockholders. *See infra*, note 6.

In 1965, the Court declined to extend for diversity purposes the limited holding of *Russell* when faced with the issue of the treatment of unincorporated associations in the form of trade unions. In *Bouligny*, 382 U.S. at 151,

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[3] The Court's reference to "a limited partnership in the common law sense" is not entirely clear given that limited partnerships are in derogation of the common law, and that New York, the first American common-law jurisdiction to enact a limited partnership act (1822), modeled its statute after the French (1673) and Louisiana (1808) *societé en commandite* statutes. Comment, *An Examination of Louisiana Limited Partnership – The partnership in Commendam*, 55 Tul.L.Rev. 515, 516-17 (1981); *Cf. Carden*, 494 U.S. at ___, 110 S.Ct. at 1028, 108 L.Ed.2d at 176 (O'Connor, J., dissenting) ("The Court fails to acknowledge that our modern limited partnership, like the *sociedad*, finds its origins in the civil law. The limited partnership originated in Europe in the middle ages, first appearing in France. . . . ").

86 S.Ct. at 275, 15 L.Ed.2d at 221, the Court noted that the "problem [*Russell*] presented was that of fitting an exotic creation of the civil law, the *sociedad en comandita*, into a federal scheme which knew it not." The Court also noted that, despite a contrary assertion of the Second Circuit (in *Mason v. American Express Co.*, 334 F.2d 392 (2d Cir.1964)), the effect of *Russell* was to constrict rather than to broaden diversity jurisdiction. Significantly,

> [a]t the time *Russell* was decided, Puerto Rico was not considered a "State" for purposes of the federal diversity jurisdiction statute. Accordingly a *sociedad*, although recognized as a citizen of Puerto Rico in *Russell*, could not avail itself of the general diversity statute.

Bouligny, 382 U.S. at 152 n. 10, 86 S.Ct. at 275 n. 10, 15 L.Ed.2d at 221 n. 10.

In one cryptic paragraph the *Carden* Court, while neither overruling *Russell* nor confining it to its facts, stated that it viewed that case as a rare exception to a longstanding rule.

> The one exception to the admirable consistency of our jurisprudence on this matter is *Puerto Rico v. Russell & Co.*, which held that the entity known as a *sociedad en comandita*, created under the civil law of Puerto Rico, could be treated as a citizen of Puerto Rico for purposes of determining federal court jurisdiction. The *sociedad's* juridical personality, we said, "is so complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the *sociedad* has a different status for purposes of federal jurisdiction than a corporation organized under that law."

494 U.S. at ___, 110 S.Ct. at 1018, 108 L.Ed.2d at 164-65 (citations and some abridgments omitted).

In its brief, Sears painstakingly points out the parallel, but not precisely identical,[4] civil-law origins of the Puerto Rican *sociedad en comandita* and the Louisiana partnership in commendam. In doing so Sears misperceives the teaching of *Carden*, which essentially forecloses the characteristic-by-characteristic inquiry which Sears would have us undertake today.[5] The partnership in commendam concededly is very similar to the *sociedad*. But it is also similar to the limited partnerships now extant in common law jurisdictions; indeed, each of the "exotic" characteristics recognized by *Russell* as inhering in the *sociedad* is also present in limited partnerships of Louisiana's sister states within the Fifth Circuit, and indeed, most of the other states of the Union.[6] We must note that

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[4] *Cf.* O'Neal, *An Appraisal of the Louisiana Law of Partnership: A Comparative Law Focus on Source Materials and Underlying Practices (Part 1)*, 9 La.L.Rev. 307, 309 (1949) ("The Louisiana law of partnership, perhaps even more than other phases of Louisiana law, is a legacy of a legal 'melting pot.' "). An example of a common-law partnership concept imported into the civilian tradition of Louisiana law is that of partnership estoppel, adopted by the Louisiana Supreme Court in 1866 in *Grieff & Byrnes v. Boudousquie & Fortier*, 18 La.Ann. 631, 89 Am. Dec. 698 (1866). O'Neal, *Appraisal* at 327.

[5] More precisely, *Carden* reaffirmed that *Bouligny* had foreclosed such inqury, 494 U.S. at ___, 110 S.Ct. at 1018, 108 L.Ed.2d at 164 ("The problem with this argument lies not in its logic, but in the fact that the approach it espouses was proposed and specifically rejected in *Bouligny*.").

[6] The Court listed the following characteristics of the *sociedad*:

(Continued on following page)

the Civil Code of Louisiana permits partnerships to characterize themselves as "limited partnerships." Article

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(Continued from previous page)

> It may contract, own property and transact business, sue and be sued in its own name and right. Its members are not thought to have a sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant. It is created by articles of association filed as public records. Where the articles so provide, the *sociedad* endures for a period prescribed by them regardless of the death or withdrawal of individual members. Powers of management may be vested in managers designated by the articles from among the members whose participation is unlimited, and they alone may perform acts legally binding on the *sociedad*. Its members are not primarily liable for its acts and debts, and its creditors are preferred with respect to its assets and property over the creditors of individual members, although the latter may reach the interests of the individual members in the common capital. Although the members whose participation is unlimited are made contingently liable for the debts of the *sociedad* in the event that its assets are insufficient to satisfy them, this liability is of no more consequence for present purposes than that imposed on corporate stockholders by the statute of some states.

Russell, 288 U.S. at 481 (citations omitted), 53 S.Ct. at 449, 77 L.Ed. at 907-08. While these characteristics differ greatly from the common-law partnership, they are found in the modern codes which define limited partnerships. *See, e.g.*, Tex.Rev.Civ.Stat.Ann. art. 6132a-1 (West 1970 & Supp.1991) Comment of the Partnership Law Committee of the Section on Corporation, Banking and Business Law Committee of the Section on Corporation, Banking and Business Law of the State Bar of Texas (citations omitted):

(Continued on following page)

2838 provides that "the name must include language consisting of the words 'limited partnership' or 'partnership in commendam.' "

We recognize and are impressed by the exhaustive research and scholarly analysis of counsel for Sears but we are duty bound to apply faithfully the teaching of the majority in *Carden*, which closed its analysis of the jurisdiction issue by noting, "The *fifty States* have created, and will continue to create, a wide assortment of artificial entities possessing different powers and characteristics,

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(Continued from previous page)

Entity Nature of Limited Partnership.

> The entity nature of general partnerships under Texas Uniform Partnership Act is now widely recognized. The entity nature of limited partnerships under [Texas Revised Limited Partnership Act] is even more pronounced. Limited partners are, with rare exception, not liable for partnership obligations. Neither general nor limited partners have rights in partnership as though they were not partners. Process may be served on the partnership through a general partner, a registered agent or (in some circumstances) the Secretary of State. Changes of limited partners and (in some cases) general partners may take place without dissolution of the partnership. And, reconstitution is permitted after some kinds of dissolution. Limited partners may sue derivatively to enforce rights of the partners. Reorganizations and mergers are recognized as in corporate entities. Indeed, throughout TRLPA, the limited partnership is treated as an entity rather than as an aggregate of individuals.

See also Miss.Code Ann § 79-14-101 (1989 & Supp.1991); 6 Uniform Laws annotated (1969 & Supp.1991).

and composed of various classes of members with varying degrees of interest and control." 494 U.S. at ___ (emphasis supplied), 110 S.Ct. at 1022, 108 L.Ed.2d at 169. The Court suggested that any change in the jurisdictional treatment accorded these entities should be addressed to the Congress and not the courts. We must agree with the observation of the trial court "that Louisiana, while enjoying a civilian tradition, is one of the United States. the fact that a Louisiana partnership in commendam derives from a civilian code provides no reason for treatment different from other American limited partnerships." 739 F.Supp. at 1084 n. 8. We find little support for the suggestion that the Supreme Court intended an exception for *any* entity other than a *sociedad en comandita*, especially for one which on its face is indistinguishable from an ordinary limited partnership.[7] The district court was correct in holding that *Carden* does not admit of a partnership in commendam exception to the rule that limited partnerships are to be treated for diversity purposes no differently than ordinary partnerships.

Pendent Jurisdiction

That there is no diversity jurisdiction herein and with the advent of the dismissal of the RICO claim, no federal

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[7] *Cf. Carden*, 494 U.S. at ___ n. 2, 110 S.Ct. at 1019 n. 2, 108 L.Ed2d at 165 n. 2 ("For the reasons stated in the test, *Bouligny* considered and rejected applying *Russell* beyond its facts."); *see also Id.* at ___, 110 S.Ct. at 1028, 108 L.Ed.2d at 177 (O'Connor, J., dissenting) (referring to decision as "endorsing treatment of a Puerto Rican business association as an entity while refusing to treat as an entity its virtally identical stateside counterpart. . . . ").

question jurisdiction, does not decide the pressing issue of the proper exercise of pendent jurisdiction of the state-law claims advanced along with the RICO claim. In dismissing without prejudice the state-law claims the district court cited the rubric that, "Where federal claims are dismissed before trial, pendent state claims should be dismissed as well." *Newport*, 739 F.Supp. at 1084 (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Wong v. Stripling*, 881 F.2d 200 (5th Cir. 1989)). While that rule of law generally presents an appropriate course of action in many instances, it is neither absolute nor automatic. It neither directs nor guides the disposition of a case such as that at bar. As the Supreme Court noted of late:

> More recently, we have made clear that this statement does not establish a mandatory rule to be applied inflexibly in all cases. The statement simply recognizes that in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims.

Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n. 7 (citation omitted), 108 S.Ct. 614, 619 n. 7, 98 L.Ed.2d 720, 730 n. 7 (1988) (*CMU*).

In *CMU*, the Court gave clear guidance to the district courts in their determination of the appropriate exercise of pendent jurisdiction pursuant to *Gibbs*.

> Under *Gibbs* a federal court should consider and weigh in each case, and at every stage of litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuits in its early states and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.

Id. at 350, 108 S.Ct. at 618-19, 98 L.Ed.2d at 729-30. The decision to exercise or decline pendent jurisdiction is within the discretion of the district court. *Wong*, 881 F.2d at 204. In the instant case, after four years of litigation produced 23 volumes and thousands of pages of record, the preparation of a pretrial order exceeding 200 pages, over a hundred depositions, and according to counsel nearly two hundred thousand pages of discovery production, the declining to hear this case on the eve of trial constituted an abuse of the trial court's discretion.[8] None of the *Gibbs* factors – judicial economy, convenience, fairness, and comity – would be offended by the exercise of pendent jurisdiction after dismissal of the federal claim; indeed, judicial economy and convenience, state and federal, and a conscious regard for the ultimate interests of

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[8] Counsel informs the court that prior to the dismissal there had been, *inter alia*, 157 depositions in 24 cities in 12 states; production of 211,495 documents including 63,000 by third persons; 14 motions to compel and for protective orders, 3 protective orders, and a confidentiality designation.

the litigants, counsel strongly in favor of the retention of jurisdiction. Finally, while the matters remaining in this lawsuit are solely questions of state law, they present no novel or especially unusual questions which cannot be readily and routinely resolved by the court *a quo*.

Hesitant though we may be in rejecting the exercise of discretionary authority by the trial court, we are compelled to do so when we consider the resources, public and private, already invested in this lawsuit, clearly distinguishing it from the ordinary cases in which the federal claims are disposed of early in the life of the litigation.[9] The district court focused this for us in referring to the "hundreds of Court hours" devoted to the case and noting that the litigation had reached "the eve of trial after years of difficult discovery." 739 F.Supp. at 1083. The order dismissing without prejudice the state-law claims is VACATED and the matter is returned to the

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[9] *Cf. Rosado v. Wyman*, 397 U.S. 397, 404-05 (footnote omitted), 90 S.Ct. 1207, 1214, 25 L.Ed.2d 442, 451 (1970):

> Unlike insubstantiality, which is apparent at the outset, mootness, frequently a matter beyond the control of the parties, may not occur until after substantial time and energy have been expended looking toward the resolution of a dispute that plaintiffs were entitled to bring in a federal court.
>
> We are not willing to defeat the common-sense policy of pendent jurisdiction – the conservation of judicial energy and the avoidance of multiplicity of litigation – by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim.

district court for further proceedings consistent herewith.[10]

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[10] Contemporaneous with its published disposition of the claims at bar, the district court also filed an order partially granting and partially denying Sears' motion to strike as privileged certain exhibits reflecting the opinion of D. Charles Houk. For the reasons stated therein that ruling is affirmed. In the published opinion, however, the district court intimated that the decision on privilege may have been influenced by its disposition of the federal RICO claim. 739 F.Supp. at 1079 n. 1. On remand, the district court is free to revisit that issue, should it choose to do so, as it may apply to the state-law claims.

DENIALS OF REHEARING EN BANC
UNITED STATES COURT OF APPEALS
Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 35)

Group 1–Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2–Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3–Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
Grand Jury Subpoena, For Attorney Representing Criminal Defendant, Reyes-Requena, In re	91-2058	9/27/91	S.D.Tex., 926 F.2d 1423
Hotvedt v. Schlumberger Ltd. (N.V.) .	90-2005	10/2/91	S.D.Tex., 942 F.2d 294
N.L.R.B. v. Hood Furniture Mfg. Co., Div. of Hood Indus. Park, Inc. .	90-4309	9/25/91	N.L.R.B., 941 F.2d 325
Newport Ltd. v. Sears, Roebuck and Co.	90-3559	9/24/91	E.D.La., 941 F.2d 302
Robinson v. Pourciau	90-3700-	9/23/91	M.D.La., 943 F.2d 1313

NEWPORT LIMITED, etc.

v.

SEARS, ROEBUCK & CO.

Civ. A. No. 86-2319.

United States District Court,
E.D. Louisiana.

May 21, 1990.

Phillip A. Wittmann, Stone, Pigman, Walther, Wittmann & Huthinson, New Orleans, La., for plaintiff.

Harry McCall, Jr., Chaffe, McCall, Phillips, Toler & Sarpy, New Orleans, La., for defendant.

ORDER AND REASONS

ARCENEAUX, District Judge.

This matter comes before the Court on motion to dismiss filed by Sears, Roebuck & Co. ("Sears"), seeking the dismissal of two claims made by the plaintiff, Newport Limited ("Newport"), including Newport's seventh cause of action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c). Sears argues that Newport has failed to allege facts sufficient to meet RICO's "continuity" requirement, and that the allegations relating to predicate acts and pattern, association with and participation in an enterprise, and damages are legally insufficient. For the reasons set forth hereinafter, the Court has determined that dismissal of

the RICO claim is appropriate, and that the pendent state claims should be dismissed as well.

Discovery has been completed in this matter, and a motion for summary judgment has been filed by Sears (Doc. 442) in which its motion to dismiss the RICO claim is effectively incorporated, and in opposition to which Newport has incorporated its argument. (Doc. 448, p. 82). The facts have been extensively briefed by the parties, and to the degree that undisputed facts are relied upon, the motion to dismiss shall be treated as a motion for summary judgment under Fed. R. Civ. Pro. 56(b).[1]

The facts germane to this Court's analysis of the RICO claim are largely undisputed. The parties signed a letter dated January 9, 1985, in which Sears stated:

> We have analyzed the proposal offered by you for the construction of a new import/export warehousing facility to be located within the Newport Industrial Park, New Orleans, Louisiana, such construction to be on a build-to-suit basis. Based upon our analysis and subject to the preparation of mutually agreeable legal documentation, we are prepared to enter into the transaction on substantially the following terms and conditions. . . . It is to be understood that the matters contained in this letter will form the basis of a much more detailed document, the terms and conditions of which are subject to the mutual agreement of the parties. It is not

[1] Although the Court has ruled on Sears' motion to strike privileged materials, its opinion herein would remain unchanged even if evidence otherwise deemed privileged were considered.

> intended to be a comprehensive statement of our respective rights, duties and obligations which will be fully set forth in said document.

Newport claims that sometime in the summer of 1986, "Sears management had made the decision not to go forward with the proposed project because of a change in their philosophy concerning their " 'replenishment program' " and that "[d]espite having internally reached the decision not to go forward with the project, Sears failed to communicate its decision to Newport opting instead to misrepresent its true intentions to Newport by advising that the project would continue as planned and agreed between the parties." (Doc. 323, p. 14). At the same time, Newport claims that the gist of the fraud is that Sears sought to create a contract dispute with Newport in order to coerce Newport into withdrawing from the project and shift the blame for the failure of the project from Sears to Newport. (See e.g.: Doc. 448, p. 23, 29, 79-81, att. p. 11, 13, 24).[2] Newport sets forth as predicate acts alleged violations of mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343, between July 1985 and May 1986. (Doc. 343, pp. 16-21).

In general, RICO liability requires proof of the existence of an enterprise, the defendant's employment by or association with that enterprise and the defendant's conduct of or participation in the conduct of the enterprise's affairs through a pattern of racketeering activity. *United States v. Cauble*, 706 F.2d 1322, 1333 (5th Cir. 1983), *cert.*

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[2] There is, of course, an inherent inconsistency in these allegations to be noted, which is otherwise pertinent to Newport's lack of specificity, discussed *infra*.

denied, 465 U.S. 1005, 104 S.Ct. 996, 79 L.Ed.2d 229 (1984). The defendant mus' be one who engages in a pattern of racketeering activity connected to the acquisition, establishment, conduct or control of an enterprise." *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 190 (5th Cir. 1990). Liability under § 1962(c)[3] is visited upon those persons "who being employed by or associated with . . . an enterprise, conducts or participates in the conduct of its affairs through a pattern of racketeering activity." *H.J., Inc. v. Northwestern Bell Telephone Co.*, ___ U.S.___, 109 S.Ct. 2893, 2897, 106 L.Ed.2d 195 (1989).

In *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 242 (5th Cir. 1988), *cert. denied*, ___U.S.___, 109 S.Ct. 1531, 103 L.Ed.2d 836 (1989), the Fifth Circuit delineated how "the principle of continuity limits the types of persons, patterns and enterprises that civil RICO may reach." The principle of continuity requires that the RICO person be one that either poses or has posed a continuous threat of engaging in acts of racketeering. Generally, that continuity is supplied by pleading the existence of a pattern of racketeering activity. However, "[t]he continuous threat requirement may not be satisfied if no more is pled than that the person has engaged in a limited

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[3] The statute provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

number of predicate racketeering acts." *Delta Truck*, 855 F.2d at 242.

In *H.J, Inc., supra*, the Supreme Court established that a RICO pattern requires a showing that the racketeering predicates are related and that they amount to or pose a threat of continued criminal activity. With regard to continuity, the Supreme Court held:

> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition . . . It is, in either case, centrally a temporal concept – and particularly so in the RICO context, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct. Often a RICO action will be brought before continuity can be established in this way. In such cases, liability depends on whether the *threat* of continuity is demonstrated.

H.J., Inc., 109 S.Ct. at 2901 (emphasis original).

The Supreme Court concluded that related predicates occurring with some frequency over at least six years may be sufficient to satisfy the continuity requirement, as would a showing at trial that such predicates were a

regular way of conducting the defendant's business, or a regular way of conducting or participating in the conduct of the alleged and ongoing RICO enterprise. *H.J., Inc.*, 109 S.Ct. at 2906. The Court rejected the argument that very short periods of criminal activity that do not carry a threat of continued criminal activity fall within the reach of RICO: " . . . when Congress said predicates must demonstrate 'continuity' before they may form a RICO pattern, it expressed an intent that RICO reach activities that amount to or threaten long-term criminal activity." *H.J., Inc.*, 109 S.Ct. at 2902, fn. 4.

The Fifth Circuit has applied *H.J., Inc.'s* pattern requirement in two recent cases. In *Howell Hydrocarbons, supra*, a single misrepresentation or fraudulent statement was found insufficient in the absence of proof of activities that indicate long-term criminal activity. In *Landry v. Air Line Pilots Assn. Int'l AFL-CIO*, 901 F.2d 404 (5th Cir. 1990), *reh. granted in part & denied in part* (5th Cir. Ap. 27, 1990), the Fifth Circuit singled out the allegation that one of the defendants had fraudulently received and continued to receive retirement benefits for a number of years as a fact relevant to the existence of a continuing threat. In finding a continuing threat adequately pleaded, the Court ignored three acts of alleged mail fraud directly involving the plaintiffs, which took place over a period of approximately one month, thereby implicitly finding that such acts insufficiently alleged a closed-end pattern by virtue of a lack of continuity.

Here, the predicates pleaded by Newport are alleged acts of mail and wire fraud between July 1985 and May 1986. (Doc. 323, pp. 16-21). The Court finds, as a matter of law, that these acts do not provide the continuing threat

required of a closed-ended RICO pattern. Neither do they constitute, implicitly or explicitly, the continuous threat required for an open-ended pattern. No allegations relating to an open-ended are pleaded, and none exists under the facts relied upon by Newport in support of its claims in this matter.

In addition, Newport has not shown that all of the predicate acts constitute violations of the applicable statutes. While Newport alleges that "[e]ach of the predicate acts alleged by Newport relates to Sears' plan to defraud Newport in connection with the development of the Newport Industrial Park," (Doc. 323, p. 22), the statutes require more.[4] At a minimum, the crimes of mail and wire fraud require that the communication be in furtherance of the scheme to defraud, and that the communication be in

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[4] 18 U.S.C. § 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or unauthorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, . . . shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

18 U.S.C. § 1343 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . transmits or causes to be transmitted by means of wire . . . in interstate commerce, any writings, signs, signals, pictures or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000.00 or imprisoned not more than five years, or both.

furtherance of the scheme to defraud, and that the communication relate to material facts. Newport does not allege and the facts do not support the allegation that all of the acts listed were made in furtherance of the alleged scheme to defraud or related to a material fact.

As it pertains to Newport's allegations concerning enterprise, the Court refuses to find, as a matter of law, that a plaintiff cannot be deemed the enterprise under § 1962(c). However, Sears' arguments regarding the deficiency regarding its alleged association with the enterprise are well-taken. In this regard, Newport is alleging that "Sears was associated with Newport in connection with the plans for the development of the Newport Industrial Park . . . " (Doc. 323, p. 22). In effect, Newport would place Sears in the position of conducting or participating in the conduct of Newport's affairs, or in any event so "associated" with Newport as to warrant application of the first of the three RICO tests.

The facts as pleaded and the undisputed facts established through discovery show that Sears was not associated with Newport as that term is commonly understood: "[j]oined in companionship, united in action or purpose, sharing in dignity or office, allied," 1 Oxford English Dictionary 718 (2d ed. 1989), "Closely connected, joined, or united with another (as in interest, function, activity or office)," Webster's Third New Int'l Dictionary 132 (1976). Here, it is undisputed that Sears and Newport signed a letter dated January 9, 1985. However, by the very terms of that letter, and even assuming it may have created contractual obligations of some sort, any contemplated association between the parties was in the future,

after the preparation of mutually acceptable legal documentation. No matter how important it was, for Newport to have Sears in its facility, it remained Newport's facility and Newport was solely responsible for its planning. During the times relevant to this claim, the parties were negotiating toward an association no more and no less.

This lack of association again reveals itself in the related requirement of participation in the enterprise's affairs "RICO criminalizes the *conduct of an enterprise* through a pattern of racketeering activity and not merely the defendant's engaging in racketeering activity." *Cauble*, 706 F.2d at 1331-1332 (emphasis added). In this regard,

> A defendant does not "conduct" or "participate" in the conduct of a lawful enterprise's affairs, unless (1) the defendant has in fact committed the racketeering acts as alleged; (2) *the defendant's position in the enterprise facilitated his commission of the racketeering acts;* and (3) the predicate acts had some effect on the lawful enterprise.

Cauble, 706 F.2d at 1332-1333 (emphasis added). See also: *United States v. Carlock*, 806 F.2d 535, 546 (5th Cir. 1986), *cert. Denied*, 480 U.S. 949, 950, 107 S.Ct. 1611, 1613, 94 L.Ed.2d 796, 798 (1987). Here, Newport ignores the second requirement enumerated hereinabove, and relies instead on the first and third element only. Newport does not allege and the facts do not support a finding that Sears occupied anything akin to a "position" in Newport, which is necessarily dependent on an underlying association as that term is commonly understood.

Finally, it is clear that Newport's allegations regarding damages are woefully lacking. Civil actions are

authorized under 18 U.S.C. § 1964(c): "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore . . . " The Supreme Court has held:

> '[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct' . . . Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts."

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 498, 105 S.Ct. 3275, 3286, 87 L.Ed.2d 346 (1985) (quoting *Haroco, Inc. American National Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir.1984), *aff'd*, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985)). The Fifth Circuit has interpreted this language to require the injury to be caused both factually (but for) and legally (proximately) by the predicate acts. *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740 (5th Cir.1989); *Zervas v. Faulkner*, 861 F.2d 823 (5th Cir.1988).

Newport has repeatedly refused to specify its damages throughout this litigation.[5] It is clear that it may recover only those damages factually and legally caused by the predicate acts of mail and wire fraud in this RICO claim, not those otherwise owing by virtue of an alleged breach of contract. Here, Newport seeks recovery of damages, not of those monies shown to have been expended

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[5] Newport's refusal to specify is not limited to the issue of damages, but extends to all allegations surrounding the issues of fraud presented in this matter, including those underlying its RICO claim, as discussed *infra*.

as the result of the predicate acts, but of lump sum amounts based on the successful completion of the project, itemized as "out of pocket loss, lost public monies and lost profits." (Doc. 498, p. 9). In addition to a failure of proof regarding causation by virtue of the mail and wire fraud, the generalized damages sought by Newport are, at best, speculative and based on assumed facts finding no support in the record.

Indeed, the Court fails to see evidence of even factual causation herein. In this regard, the relevant inquiry is whether the damages claimed by Newport were caused by Sears' alleged misrepresentations concerning its intent in occupying the facility upon development. See: *Ocean Energy II*, 868 F.2d 740, 747. In considering this issue, all of the undisputed facts, not just those hand-picked by Newport, are considered. Not only has Newport failed to suggest how the requisite causation can be inferred, but has continually and deliberately sought to avoid providing a coherent itemization of damages.

The record is replete with examples of undisputed facts which perhaps provide evidence of motivation for Newport's recalcitrance toward specificity. For example, it should be noted that Newport admits that it sent a document to Sears in September 1985 which called on Sears to *purchase* the property from Newport and finance its construction because Newport felt "[i]t's time we formalized our agreement." (Doc. 442, Exh. 15). In addition, Newport admits that it was informed, as least intermittently during the time in which the alleged predicate acts were performed, that Sears was not interested in additional warehouse space. (See e.g.: Doc. 448, pp. 28-36). Also, contrary to Newport's assertions, it has provided

the Court with clear and unambiguous evidence of an April 1986 partnership agreement with a Florida concern and attendant funding in the amount of $23,500,000.00 cash for the development of the Newport facility, which makes no reference to Sears' occupancy therein. (Doc. 448, Exh. 121). These examples are not unintended or isolated, nor limited to those allegations relating to damages.

Where a plaintiff claims fraudulent conduct by a defendant as a basis for its RICO claim, Fed.R.Civ.Pro. 9(b) requires that fraud be pleaded with specificity. The requirements set forth in Fed.R.Civ.Pro. 8(a) and 8(e)(1) that pleadings shall contain a "short and plain statement of the claim" and "shall be simple, concise and direct" applies to allegations of fraud. *Old Time Enterprises v. Int'l Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir.1989). Here, not only are the pleadings deficient but Newport has continually sought to obfuscate the facts surrounding their claims.

Throughout the strained history of this litigation, Newport's refusal to specify its claims of fraud, relevant here to the scheme to defraud underlying the mail and wire fraud predicates and the allegations of damages, also has been continuous and blatant. On the eve of trial after years of difficult discovery, Sears filed a motion to compel aimed at the discovery of the most rudimentary facts concerning the plaintiff's case, including those facts basic to the RICO claim. (Doc. 430). After being provided with literally hundreds of pages of responses, the Magistrate twice ordered Newport to revise its responses in a coherent and specific manner. (Doc. 446, 468). Again, over

a hundred pages of answers and responses replete with cross-references were provided.[6]

The Magistrate sanctioned Newport by permitting Sears to brief the Court on the effect of Newport's responses by way of supplemental memorandum to this Court on its effect on the pending motions. (Doc. 483). The Court finds that Newport's disregard of orders and deliberate refusal to specify its claims and the facts upon which it relies is pure contumacy. Given the hundreds of Court hours devoted to routine pre-trial matters, at the very least, it reflects the futility of permitting amendment to either the complaint or the RICO case statement; at most, it warrants imposition of the more severe sanctions under Fed.R.Civ.Pro. 37(b), including dismissal with prejudice.

Newport initially claimed diversity as the basis of this Court's subject matter jurisdiction. Over two years later, by way of fourth amended complaint filed on October 5, 1988, Newport added a RICO claim and alternatively claimed federal question jurisdiction. The Court has recently been advised by Newport that diversity does not exist between the parties, and that the complaint should be amended to reflect federal question jurisdiction as the basis for this Court's subject matter jurisdiction. (Doc. 503). *Carden v. Arkoma Associates*, ___ U.S. ___, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990).[7] Where federal claims

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[6] Newport's responses to the Magistrate's order are hereby made part of the record.

[7] The Court notes that Newport failed to properly allege diversity jurisdiction even under Fifth Circuit precedent

(Continued on following page)

are dismissed before trial, pendent state claims should be dismissed as well. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Wong v. Stripling*, 881 F.2d 200 (5th Cir. 1989).

Finally, the Court has considered Sears' memorandum as to jurisdiction, in which it argues that a Louisiana partnership in commendam should be treated as a corporation for jurisdictional purposes. However, the Supreme Court in *Carden* specifically commented that entities other than the Puerto Rican sociedad en comandita discussed in *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 53 S.Ct. 447, 77 L.Ed. 903 (1933), would likely be treated as unincorporated groups for diversity purposes. *Carden*, 110 S.Ct. at 1018. The Court notes that the similarities shared by all limited partnerships was detailed by the dissent in *Carden*, and recognized by the majority when it simply stated that it had rejected applying *Russell* beyond its facts in *Steelworkers v. R.H. Bouligny*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965). *Carden*, 110 S.Ct. at 1019, fn 2.[8] The

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(Continued from previous page)

requiring reference to citizenship of general partners, which was reversed by the Supreme Court in *Carden, supra*, despite being ordered to amend its jurisdictional statement. (Docs. 1, 176, 177).

[8] The Court parenthetically notes that Louisiana, while enjoying a civilian tradition, is one of the United States. The fact that a Louisiana partnership in commendam derives from a civilian code provides no reason for treatment different from other American limited partnerships. In addition, to otherwise construe "American-but Louisianian" limited partnerships as incorporated entities could have far reaching implications, such as subjecting such entities to that system of federal income taxation imposed upon corporations.

Court has been provided with no good reason to apply *Russell* to the facts herein.

Accordingly,

IT IS ORDERED that the motion to dismiss filed by Sears, Roebuck & Company, treated in part as a motion to dismiss, is hereby GRANTED as to the claim brought under 18 U.S.C. § 1962(c), and the pendent state law claims are DISMISSED. Judgment shall be entered accordingly.

MINUTE ENTRY
ARCENEAUX, J.
MARCH 28, 1989

NEWPORT LIMITED, ETC.

VERSUS

SEARS, ROEBUCK & CO.

CIVIL ACTION
NO. 86-2319
SECTION "K"

(Filed March 28, 1989)

The Court now has before it the motion to dismiss, motion for summary judgment and motion to strike privileged materials filed by the defendant, Sears, Roebuck and Company ("Sears"). This matter is presently set for pre-trial conference on March 29, 1989, at 9:30 A.M. and trial on April 10, 1989. Having thoroughly reviewed the record, the memoranda of counsel and the law, the Court has determined that its ruling on these motions and trial in this matter should be deferred for the reasons set forth hereinafter.

Specifically, the Court does not believe that the requirements for a claim under the Racketeer Influenced and Corrupt Organizations ("RICO"), 18 U.S.C. § 1962(c), are sufficiently settled in the Fifth Circuit at this time, and is not inclined to proceed to trial until *en banc* resolution of the issues presented in *Smith v. Cooper/T. Smith Corp.*, 850 F.2d 1086 (5th Cir. 1988). This concern is only magnified when the anticipated length and costs attendant to trial in this matter are considered. In addition, even if the remaining claims should survive summary judgment, the Court finds that proceeding to trial on the

remaining issues would be neither expeditious nor prudent, considering the committment of judicial resources and the possible dissipation thereof a trial under current circumstances would impose.

Accordingly,

IT IS ORDERED that the motion to dismiss, motion for summary judgment and motion to strike privileged materials filed by the defendant, Sears, Roebuck and Company are DEFERRED pending *en banc* resolution of *Smith, supra* by the Fifth Circuit.

IT IS FURTHER ORDERED that the pre-trial conference and trial dates of March 29, 1989, at 9:30 A.M. and April 10, 1989, are CONTINUED without date to be RESET at a preliminary pre-trial arranged by the Courtroom Deputy after resolution of the pending motions. All discovery in this matter is hereby STAYED.

/s/ Hon. G. Arceneaux

MINUTE ENTRY
ARCENEAUX, J.
April 9, 1990

NEWPORT LTD.,
A PARTNERSHIP
IN COMMENDAM

VERSUS

SEARS, ROEBUCK
& CO.

CIVIL ACTION
NO. 86-2319
SECTION K

(Filed April 11, 1990)

IT IS ORDERED that the plaintiff file both a statement of the citizenship of the parties and proof as to same no later than April 16, 1990, at Noon. See: *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990).

/s/ Hon. G. Arceneaux

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

NEWPORT LIMITED, A PARTNERSHIP IN COMMENDAM	*	CIVIL ACTION
	*	NO. 86-2319
VERSUS	*	SECTION "K"
	*	MAGISTRATE 5
SEARS, ROEBUCK AND CO.	*	

* * * * * * * * * * * * * * * * *

STATEMENT REGARDING CITIZENSHIP

(Filed April 16, 1990)

Plaintiff Newport Limited, A Partnership in Commendam, by Order of the Court dated April 9, 1990, hereby submits this statement of citizenship, as follows:

1.

At the time this action was filed, under prevailing Fifth Circuit law, complete diversity of citizenship between the parties existed, in that:

(a) Defendant Sears, Roebuck and Co. was a corporation organized and existing pursuant to the laws of the State of New York, with its principal place of business in the State of Illinois (as admitted by defendant in its answer);

(b) Plaintiff Newport Limited was a limited partnership organized and existing under the laws of, and with its principal place of business in, the State of Louisiana;

(c) The general partner of plaintiff Newport Limited was Newport Enterprises, another limited partnership organized and existing under the laws of, and with its principal place of business in, the State of Louisiana; and,

(d) The general partners of Newport Enterprises were citizens and residents of the State of Louisiana.

2.

Recently, the United States Supreme Court held that the citizenship of all partners, limited and general, in a limited partnership must be considered in determining whether complete diversity exists for purposes of 28 U.S.C. § 1332. *Carden v. Arkoma Associates*, 58 U.S.L.W. 4243 (February 27, 1990). As a result of this decision, plaintiff Newport Limited must inform the Court that one of its limited partners, the Estate of Townsend Martin, is considered to be a citizen of the State of New York. At the time of his death, Mr. Martin was a citizen of the State of New York. The Estate has two executors, one of whom is a corporation organized and existing under the laws of, and with its principal place of business in, the State of New Jersey; the other is an individual who is a citizen of the State of New York.

3.

Evidence of the foregoing is attached hereto as Exhibit A.

4.

As a result of the foregoing, Newport Limited, at the verbal request of the Court, hereby states that Paragraph

I of the Complaint, Third Amending Complaint and Fourth Amended Complaint, entitled "Jurisdiction," should be amended as follows:

JURISDICTION

I.

The Court has jurisdiction over this action pursuant to 18 U.S.C. § 1965, pursuant to 28 U.S.C. § 1331, and pursuant to the Court's pendent jurisdiction.

5.

All other paragraphs, provisions and allegations of the complaint and all supplemental and amending complaint should be reaverred and adopted in their entirety.

Respectfully submitted,

/s/ Phillip A. Wittmann
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Attorneys for Newport
Limited, A Partnership
in Commendam

CERTIFICATE

I hereby certify that a copy of the above and foregoing Statement Regarding Citizenship has been served by hand delivery upon all counsel of record, this 16 day of April, 1990.

/s/ Stephen H. Kupperman
Stephen H. Kupperman

EXHIBIT A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

NEWPORT LIMITED, A PARTNERSHIP IN COMMENDAM	*	CIVIL ACTION NO. 86-2319
VERSUS	*	SECTION "K"
SEARS, ROEBUCK AND CO.	*	MAGISTRATE DIVISION "5"

* * * * * * * * * * * * * * *

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned Notary Public, came and appeared C. Bronson Doyle, who, after being duly sworn, did state that as of June 3, 1986, the date of suit, the following information was accurate, to the best of his information and belief:

1. Newport Limited, A Partnership In Commendam ("Newport Limited"), was a limited partnership organized and existing under the laws of, and with its principal place of business in, the State of Louisiana.

2. The general partner of Newport Limited was Newport Enterprises, which itself was a limited partnership organized and existing under the laws of, and with its principal place of business in, the State of Louisiana.

3. The limited partners of Newport Enterprises were citizens of the State of Louisiana, the State of Alabama, or the State of Florida.

4. The general partners of Newport Enterprises were citizens of the State of Louisiana.

5. The limited partners of Newport Limited were the following:

a. Javelin New Orleans Limited Partnership, a limited partnership organized and existing under the laws of the State of Louisiana. The general and limited partners were citizens of the State of Pennsylvania and of the State of Florida.

b. The Cochran Partnership, a general partnership organized and existing under the laws of the State of Louisiana, whose partners were citizens of the State of Florida, the State of New Jersey, the State of Delaware, the State of Georgia (one partner is a corporation organized under the laws of the State of Delaware and with its principal place of business in the State of Georgia), and of the United Kingdom.

c. The Estate of Townsend Martin. At the time of his death, Mr. Martin was a citizen of the State of New York. One representative of the Estate of Mr. Martin is a citizen of the State of New York; the other is a corporation existing and organized under the laws of, and with its principal place of business in, the State of New Jersey.

/s/ C. Bronson Doyle
C. Bronson Doyle

Sworn to and subscribed

before me this 16th day

of April, 1990.

/s/ Barry W. Ashe
NOTARY PUBLIC

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 90-10478 DIVISION "K"

NEWPORT LIMITED, A PARTNERSHIP IN COMMENDAM

VERSUS

SEARS, ROEBUCK AND COMPANY

JUDGMENT

This matter came for hearing on a Motion for Protective Order and Motion to Use Federal Court Discovery filed herein on behalf of Sears, Roebuck and Co. and a Motion to Use Federal Court Discovery filed herein on behalf of Newport Limited:

After considering the pleadings, the arguement [sic] of Counsel and the law:

IT IS ORDERED, ADJUDGED AND DECREED that the Motion to Use Federal Court Discovery filed herein on behalf of Newport Limited be, and the same is hereby granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion to Use Federal Court Discovery filed herein on behalf of Sears Roebuck and Co. be, and the same is hereby granted limited to interrogatories and responses; requests for production and responses, requests for production responses and documents produced; requests for admission and responses, transcripts of, videotapes of, documents produced at, and exhibits to all testimonial and videotape depositions.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion for Protective Order filed herein on behalf of Sears, Roebuck and Co. be, and the same is hereby denied.

JUDGMENT READ, RENDERED AND SIGNED this 22nd day of May, 1991 at New Orleans, Louisiana.

/s/ Hon. R. Ganucheau
JUDGE

(2)

No. 91-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NEWPORT LIMITED, a Partnership in Commendam,
Petitioner,

v.

SEARS, ROEBUCK AND CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent believes no question deserving the Court's attention is presented by petitioner's brief; however, petitioner's phrasing in the "Question Presented" section of its brief is incorrect in that it fails to mention the extreme amount of judicial and private resources and time devoted to this matter in the district court, misleadingly states that the law governing "certain" of its state law claims is unsettled, and improperly ignores the discretionary nature of the exercise of pendent jurisdiction, which the Fifth Circuit correctly found was abused here.

LIST OF PARTIES

The parties are listed in the caption. The nonwholly owned subsidiaries of respondent, Sears, Roebuck and Co., are:

Sears Canada Inc.

Sears, Roebuck de Mexico, S.A.

Sears, Roebuck Pty. Limited (Australia)

Prodigy Services

Tires Plus Cl.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
STATEMENT OF THE CASE	3
1. Additional Information on the Jurisdictional Dispute	3
2. More on the Underlying Litigation	4
SUMMARY OF ARGUMENT	5
REASONS FOR DENYING THE WRIT	6
I. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH *GIBBS* AND ITS PROGENY	6
II. THE FIFTH CIRCUIT'S DECISION DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS	11
CONCLUSION	16
APPENDIX:	
Order of the United States Court of Appeals for the Fifth Circuit, No. 90-3559 (July 10, 1991)	1a

TABLE OF AUTHORITIES

Cases: Page

Acme Refrigeration of Baton Rouge, Inc. v. Whirlpool, 785 F.2d 1240 (5th Cir. 1986), *cert. denied*, 479 U.S. 848 (1986) 11
Berg v. First State Ins. Co., 915 F.2d 460 (9th Cir. 1990) 15
Blau Plumbing Inc. v. S.O.S. Fix-It, Inc., 781 F.2d 604 (7th Cir. 1986) 12
Brill v. Catfish Shaks of America, Inc., 727 F. Supp. 1035 (E.D. La. 1989) 10
Brown v. Knox, 547 F.2d 900 (5th Cir. 1977), *cert. denied sub nom. Knox v. Brown*, 432 U.S. 906 (1977) 13
Carnegie-Mellon University v. Cohill, 484 U.S. 343 (1988) 6, 10, 12, 13
Caserta v. Village of Dickinson, 672 F.2d 431 (5th Cir. 1982) 13
Cooley v. Pennsylvania Housing Finance Agency, 830 F.2d 469 (3d Cir. 1987) 13
Danner v. Himmelfarb, 858 F.2d 515 (9th Cir. 1988), *cert. denied sub nom. Davis v. Himmelfarb*, 490 U.S. 1067 (1989) 14, 15
Dezell v. Day Island Yacht Club, 796 F.2d 324 (9th Cir. 1986) 11, 12
Grano v. Barry, 733 F.2d 164 (D.C. Cir. 1984) 11
Hagans v. Lavine, 415 U.S. 528 (1974) 6, 12
Hudak v. Economic Research Analysts, Inc., 499 F.2d 996 (5th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975) 10
In Re Ward, 894 F.2d 771 (5th Cir. 1990) 10
Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295 (5th Cir. 1983) 10
Jackson v. Stinchcomb, 635 F.2d 462 (5th Cir. 1981) 6
Johnson v. Bechtel Associates Professional Corp., 801 F.2d 412 (D.C. Cir. 1986) 4
Kidder, Peabody & Co. v. Maxus Energy Corp., 925 F.2d 556 (2d Cir. 1991), *cert. denied*, 59 U.S.L.W. 3837 (1991) 11

TABLE OF AUTHORITIES—Continued

	Page
Knuth v. Erie-Crawford Dairy Cooperative Association, 395 F.2d 420 (3d Cir. 1968)	13
Lovell Mfg. v. Export-Import Bank, 843 F.2d 725 (3d Cir. 1988)	15
Myers v. First City Bank, No. 86-3393 (E.D. La. 1988)	10
Morris v. Homco International, Inc., 853 F.2d 337 (5th Cir. 1988)	10
Newport Limited v. Sears, Roebuck and Co., 739 F. Supp. 1078 (E.D. La. 1990)	3, 4, 5, 7, 9
Newport Limited v. Sears, Roebuck and Co., 941 F.2d 302, *reh'g denied*, 946 F.2d 893 (5th Cir. 1991)	2, 4, 6, 10, 11, 14, 15
Ostrer v. United States, 584 F.2d 594 (2d Cir. 1978)	4
Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972)	10
Raucci v. Town of Rotterdam, 902 F.2d 1050 (2d Cir. 1990)	12
Ray v. Tennessee Valley Authority, 677 F.2d 818 (11th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983)	14
Rice v. Branigar Organization, Inc., 922 F.2d 788 (11th Cir. 1991)	13, 14
Rosado v. Wyman, 397 U.S. 397 (1970)	12
Shaffer v. Board of School Directors, 730 F.2d 910 (3d Cir. 1984)	11, 12
Sparks v. Hershey, 661 F.2d 30 (3d Cir. 1981)	13
United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	2, 5, 6, 11, 12
Williams v. City of River Rouge, 909 F.2d 151 (6th Cir. 1990)	12

Statute:

18 U.S.C. § 1961	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1044

NEWPORT LIMITED, a Partnership in Commendam,
Petitioner,

v.

SEARS, ROEBUCK AND CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Sears, Roebuck and Co. ("Sears") opposes the petition of Newport Limited, A Partnership in Commendam ("Newport"), for a writ of certiorari. The United States Court of Appeals for the Fifth Circuit correctly found that the district court had abused its discretion in failing, on the eve of trial, to exercise pendent jurisdiction over Newport's state law claims after four years of vigorous litigation resulting in 23 volumes and thousands of pages of record, a pre-trial order exceeding

200 pages, over a hundred depositions, and nearly two hundred thousand pages of discovery production. *Newport Limited v. Sears, Roebuck and Co.*, 941 F.2d 302, 307, *reh'g denied*, 946 F.2d 893 (5th Cir. 1991).

Newport now seeks to have the Court review the Fifth Circuit's fact-specific ruling by erroneously contending that the Fifth Circuit's decision conflicts with the principles underlying *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and with decisions of other circuits. To the contrary, the Fifth Circuit properly applied the principles enunciated by this Court in *Gibbs* and its progeny, and the Fifth Circuit's ruling does not conflict with rulings of any other circuits Newport can identify. In reality, Newport is seeking to enlist the aid of the Court in furtherance of Newport's forum shopping and recently-acquired preference to have a state court decide its claims.

Newport's current claim that the Fifth Circuit "has deprived Newport of the opportunity to have Newport's state law claims decided by a state court", Newport's Petition at 6, contrasts sharply with Newport's conduct during the first four years of this litigation. Newport first chose *federal court* as its forum to decide its initial complaint of exclusively state law claims, and amended its complaint three times with only state law claims. Newport never showed any concern about the district court's deciding its state law claims until after the district court decision dismissing the later-added RICO claim on its merits and expressing doubts about the rest of Newport's claims.[1]

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[1] Among the district court's findings that apparently give Newport pause about continuing in federal court are that there was "an inherent inconsistency" in Newport's allegations, that Newport's damages allegations were "woefully lacking" and ". . . at best, speculative and based on assumed facts finding no support in the record", and that "Newport's disregard of orders and deliberate

Sears respectfully submits that Newport's petition asserts nonexistent conflicts among the circuits, seeks improperly to further Newport's forum manipulation and should be summarily denied.

STATEMENT OF THE CASE

1. Additional Information on the "Jurisdictional Dispute"

Newport's statement of "the jurisdictional dispute" is incomplete and requires amplification on several points. For example, Newport states that it "immediately instituted" state court proceedings once the district court had dismissed the federal lawsuit. Newport's Petition at 4. Newport, however, neglects to mention that it intentionally withheld service of the state court suit on Sears for over four months. Newport also distorts the import of the state court's order on the use in state court of discovery from the federal proceedings by alleging that the order will "avoid undue expense and duplication of effort." Due to the state court's refusal, at Newport's request, to include the district court's discovery orders, however, numerous limitations imposed by the district court to prevent repetitious and harassing discovery by Newport have been ignored in the state court proceedings and have already caused wasteful and needless redundant litigation.

The one step taken by the state court that removed the threat of duplication and waste of judicial and private resources was to stay proceedings there on October 22, 1991 during the pendency of the litigation in the district court. Newport also neglects to mention that the Fifth Circuit took the unusual step of issuing its mandate the day after oral argument in July of 1991. 1a.[2]

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refusal to specify its claims and the facts upon which it relies [was] pure contumacy." *Newport Limited v. Sears, Roebuck and Co.*, 739 F. Supp. 1078, 1079 n.2 (E.D. La. 1990).

[2] Immediate issuance of a mandate signifies a circuit's opinion that it "would not change its decision upon rehearing, much less

2. More on the Underlying Litigation

Although Sears agrees that the facts out of which this litigation grew are not technically germane to the petition before this Court, Sears must rectify some of Newport's innuendos intended to invoke unwarranted sympathy.

First, Newport characterizes the letter it provided to Sears in support of Newport's Urban Development Action Grant application as a "binding agreement," a "fact" Sears strenuously disputes and which is belied by the letter's own terms. Newport's Petition at 5. The district court concluded that this letter indicated that "any contemplated association between the parties was in the future, after the preparation of mutually acceptable legal documentation." *Newport Limited v. Sears, Roebuck and Co.*, 739 F. Supp. 1078, 1082 (E.D. La. 1990). The Fifth Circuit referred to the same letter as showing that "the parties agreed to agree." *Newport*, 941 F.2d at 303.

Newport also states as settled "fact" that Sears later decided it did not need a new warehouse at Newport's location and "decided not to advise Newport." Newport's Petition at 5. Sears never decided not to proceed with the lease transaction it was negotiating with Newport, and the district court stated that "Newport admits that it was informed . . . that Sears was not interested in additional warehouse space." *Newport*, 739 F. Supp. at 1083. Newport also alleges at page 5 of its petition that Sears opted to "engage in a pattern of misrepresentations," allegations which Sears denies and which the district court deemed "deficient." *Id.*

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hear the case *en banc*", and that "there is no reasonable likelihood that the Supreme Court would grant review." *Johnson v. Bechtel Associates Professional Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986); *Ostrer v. United States*, 584 F.2d 594, 598 (2d Cir. 1978). The immediate issuance of mandate is a further indication of the strength of the Fifth Circuit's belief that the district court abused its discretion.

Newport's statement at page 5 of its petition that it "continued construction" after Sears allegedly changed its mind is misleading in that the minimal ground-preparation work performed by Newport antedated its discussions with Sears. And Newport's allegation at page 6 that Sears did not provide construction information is refuted by the testimony of Newport's own construction consultant and documents showing Newport had sufficient information to initiate construction, although it chose not to.

Finally, Newport's claim at page 6 that it incurred millions of dollars of damages as a result of Sears' actions and inactions was described as "at best, speculative and based on assumed facts finding no support in the record" by the district court. *Newport*, 739 F. Supp. at 1082-83. Newport also fails to mention that its bankruptcy proceeding was dismissed after a consensual settlement with its major secured creditor.

SUMMARY OF ARGUMENT

The Fifth Circuit's decision that the district court had abused its discretion in not exercising pendent jurisdiction is proper under *Gibbs* and its progeny and does not create a conflict with any other circuits. The *Gibbs* factors of judicial economy, convenience, fairness, and comity weigh overwhelmingly heavily in favor of the exercise of pendent jurisdiction under this case's specific facts. Newport ignores the fact that where there is discretion it can be abused, and can point to no genuine conflict with any other circuits. The Fifth Circuit's decision was proper and no need for a writ of certiorari exists here.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH GIBBS AND ITS PROGENY

Notwithstanding Newport's twisted view of pendent jurisdiction, the Fifth Circuit's analysis and decision is entirely consistent with the standards set by this Court. The Fifth Circuit was fully cognizant of, and in fact applied, in its decision the *Gibbs* factors of judicial economy, convenience, fairness, and comity. *Newport*, 941 F.2d at 307-08. The Fifth Circuit also acknowledged this Court's admonition in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), that *Gibbs* did not establish a "mandatory rule to be applied inflexibly in all cases." *Newport*, 941 F.2d at 307, citing *Carnegie-Mellon*, 484 U.S. at 350 n.7.

This Court has noted that where a court has the power to exercise pendent jurisdiction and the advantages of economy, convenience, and fairness are present, *Gibbs* does not simply permit but actually "contemplates" that the district court adjudicate the pendent claims. *Hagans v. Lavine*, 415 U.S. 528, 545 (1974). The Fifth Circuit has even recognized that "it is unusual for a court to decline to exercise that power where it exists." *Jackson v. Stinchcomb*, 635 F.2d 462, 472 (5th Cir. 1981).

A brief review of the procedural facts in this case confirms the correctness of the Fifth Circuit's holding that the *Gibbs* factors—judicial economy, convenience, fairness, and comity—are not offended by the exercise of pendent jurisdiction but "counsel strongly" in favor of retention of pendent jurisdiction. *Newport*, 941 F.2d at 308. Such a review also demonstrates the fact-specific nature of this case and its unsuitability as a "vehicle" to resolve Newport's imagined conflict among the circuits. Newport's Petition at 8.

Newport chose to file a complaint consisting of strictly state law claims with the district court in June of 1986

with jurisdiction predicated on diversity. Newport then filed three amendments to its complaint involving only state law claims. On the last day for amendments, October 2, 1988, Newport filed a fourth amended complaint adding a seventh cause of action based on 18 U.S.C. § 1961 *et seq.* (RICO).

During the course of this case the district court invested "hundreds of Court hours devoted to routine pretrial matters," *Newport*, 739 F. Supp. at 1083; four trial dates were assigned and continued; two stays of proceedings were entered; Newport amended its complaint four times, alleging seven causes of action arising out of the same facts; 157 depositions in 24 cities in 12 states were conducted; hundreds of pages were provided in response to interrogatories;[3] 211,495 documents were produced in discovery, including 63,000 by third parties; fourteen motions to compel and for protective orders were filed; three protective orders were entered along with a confidentiality order and the striking of privileged documents; two motions for summary judgment and a motion to dismiss were also filed comprising 396 pages of supporting and opposing memoranda and 159 exhibits; discovery was completed and the discovery deadline passed prior to dismissal; and a 208-page pretrial order listing 89 witnesses and 872 trial exhibits was submitted. The investment of judicial resources by the district court and the parties has been enormous. Without the exercise of pendent jurisdiction, that investment would have been wasted and substan-

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[3] For example, "[o]n the eve of trial after years of difficult discovery, Sears filed a motion to compel aimed at the discovery of the most rudimentary facts concerning the plaintiff's case. . . . After being provided with literally hundreds of pages of responses, the Magistrate twice ordered Newport to revise its responses in a coherent and specific manner. . . . Again, over a hundred pages of answers and responses replete with cross-references were provided." *Newport*, 739 F. Supp. at 1083.

tial additional resources of the state court and the parties would be expended.[4]

Newport has misleadingly alleged that the state court "has prevented any duplication" of judicial resources by making available discovery from the federal proceeding. The state court's order, however, allows use of only the results of discovery and not of the attendant orders. This omission alone will cause, and already has occasioned, a tremendous and pointless duplication of effort by the state court and the parties. The district court had entered a number of discovery orders which, for example, prevented Newport from redeposing some Sears' witnesses a third or fourth time. Since the district court's orders were not recognized by the state court, Newport immediately attempted to redepose various Sears' witnesses for a third or fourth time, a move which Sears opposed. Sears' opposition resulted in the filing of numerous pleadings and a hearing before the state court, measures nearly identical to ones taken three years earlier by the parties and the district court. This is but one example of the duplication of effort by the state court and the parties.[5]

Another glaring example of waste of judicial and private resources is the issue of certain of Sears' privileged documents. The district court found that certain documents in Newport's possession were still protected by Sears' privilege and ordered them stricken from certain pleadings. Since Newport did not view itself as bound

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[4] This is particularly true since at the time of the district court's dismissal, Sears' motion for summary judgment had been fully briefed and awaited ruling by the district court, which if granted would have disposed of some or all of the issues to be tried.

[5] Another example was Newport's serving new sets of interrogatories and production requests to Sears in state court, which would have been barred in federal court in view of the discovery cut off in that forum. Newport served such written discovery in April 1991 despite having represented at least two years earlier that it was ready for trial.

by that determination in state court, it again attempted to use the documents in that action. This in turn resulted in another round of duplicative motions and hearings before the state court, constituting needless expense of judicial and private resources. Newport's gamesmanship in this regard was not only an inconvenience to the state court, but also highly unfair to Sears which had expended substantial resources on this very issue in the district court over two years ago, only to have to re-expend resources on the same issue in state court.

Not only has the district court made a substantial investment in the case, but as a result of its four-plus years' involvement, it is intimately familiar with the facts alleged in the state law claims (these same facts allegedly supported the late-added and short-lived RICO claim) and with the behavior of Newport throughout the "strained" litigation. *Newport*, 739 F. Supp. at 1083. The district court observed "an inherent inconsistency in Newport's allegations," that [Newport's] damages allegations were "woefully lacking," that Newport "repeatedly refused to specify its damages," that "Newport's refusal to specify its claims of fraud . . . also has been continuous and blatant", and that Newport's refusal to specify its claims and alleged facts was "pure contumacy" warranting "imposition of the most severe sanctions." *Id.* at 1079 n.2, 1082-83.

It is patently unfair to Sears for Newport to be allowed to wipe the slate clean and start all over again in state court, particularly when Newport chose to file its all state law complaint in district court and decided it preferred state court only *after* the district court had rendered its scathing opinion. In a rare moment of candor, Newport admitted at oral argument before the Fifth Circuit that it viewed the district court as a "hostile forum." Newport offers no authority to support its anomalous posture of avoiding the district court's jurisdiction after actively seeking it for four years, initially

for purely state law claims only. To the contrary, this Court has recognized that forum manipulation concerns are legitimate and serious, and are relevant to a determination whether pendent jurisdiction should be exercised. *Carnegie-Mellon*, 484 U.S. at 356 n.12.

Newport now attempts to argue that it wants a "surer-footed reading of applicable law" from a Louisiana state court, disparaging the Fifth Circuit's well-founded statement that Newport's claims "present no novel or especially unusual questions which cannot be readily and routinely resolved by the court *a quo*." *Newport*, 941 F.2d at 308. Newport incorrectly argues at page 12 of its petition that "the Fifth Circuit had no basis for even considering the state law claims," ignoring the fact that in Sears' appeal it had asked the Fifth Circuit to decide Sears' pending motion for summary judgment on the state law claims as had been done in *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295 (5th Cir. 1983); *Hudak v. Economic Research Analysts, Inc.*, 499 F.2d 996 (5th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); and *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972). Sears discussed the state law claims fully in its brief and the Fifth Circuit had the entire lengthy record before it. It is disingenuous for Newport to state to this Court that the Fifth Circuit had no basis to evaluate the state law claims as routine and, interestingly, Newport *never* attempts to show that its claims involve unsettled state law. By choosing to file its suit in federal court, Newport acknowledged that its claims are the type of ordinary commercial claims which the district courts sitting in the state routinely decide under Louisiana law. *See, e.g., Myers v. First City Bank*, No. 86-3393 (E.D. La. 1988) (detrimental reliance); *In Re Ward*, 894 F.2d 771 (5th Cir. 1990) (negligent misrepresentation); *Brill v. Catfish Shaks of America, Inc.*, 727 F. Supp. 1035 (E.D. La. 1989) (unfair trade practices and breach of implied covenant of good faith and fair dealing under Louisiana Civil Code); *Morris v.*

Homco International, Inc., 853 F.2d 337 (5th Cir. 1988) (breach of contract and resulting damages); *Acme Refrigeration of Baton Rouge, Inc. v. Whirlpool*, 785 F.2d 1240 (5th Cir. 1986), *cert. denied*, 479 U.S. 848 (1986) (fraudulent misrepresentation).

The cases cited by Newport as indicating a federal court should avoid deciding *unsettled* issues of state law involve peculiarly local concerns, unlike those present here. *See, e.g., Kidder, Peabody & Co. v. Maxus Energy Corp.*, 925 F.2d 556, 564 (2d Cir. 1991), *cert. denied*, 59 USLW 3837 (1991) (whether a federal ruling applied to Texas state law of damages); *Dezell v. Day Island Yacht Club*, 796 F.2d 324, 329 (9th Cir. 1986) ("sensitive issue" of social policy occasioned by antidiscrimination law); *Grano v. Barry*, 733 F.2d 164, 169 (D.C. Cir. 1984) (local governmental process); and *Shaffer v. Board of School Directors*, 730 F.2d 910, 913 (3d Cir. 1984) (public education policy question of first impression). None of Newport's commercial claims approximates these uniquely local questions.

Finally, Newport can point to no instance of unfairness or inconvenience to it by proceeding in the forum of its first choice, whereas Sears has cited just some of the compelling examples of unfairness and inconvenience it has been and would continue to be required to undergo in wasteful, expensive, and redundant litigation in state court. Clearly, none of the *Gibbs* factors—judicial economy, convenience, fairness, and comity—weighs in Newport's favor and it was this readily evident tipping of the scales which "compelled" the Fifth Circuit to find an abuse of discretion, "hesitant though" it was to do so. *Newport*, 941 F.2d at 308.

II. THE FIFTH CIRCUIT'S DECISION DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS

Newport incorrectly asserts that the Fifth Circuit's decision creates a conflict among the circuits. Newport too facilely ignores a fundamental precept of pendent

jurisdiction: it is a doctrine of discretion and its application is reviewed for an abuse of discretion. *Gibbs*, 383 U.S. at 726; *Rosado v. Wyman*, 397 U.S. 397, 404-05 (1970); *Hagans*, 415 U.S. at 545; *Carnegie-Mellon*, 484 U.S. at 350; *see, e.g., Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990); *Blau Plumbing Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604 (7th Cir. 1986); *Dezell*, 796 F.2d 324; *Shaffer*, 730 F.2d 910.

Contrary to Newport's claim that the Fifth Circuit "stands alone" by finding that the district court abused its discretion, the Fifth Circuit properly engaged in its appellate function, reviewed the district court's exercise of its discretion and found that the specific facts of this case weighed so strongly in favor of the exercise of pendent jurisdiction that it was an abuse of discretion to decline it. No new bright line rule was enunciated; the Fifth Circuit correctly undertook the fact-specific analysis that pendent jurisdiction requires. The Fifth Circuit weighed the "commonsense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation", *Rosado*, 397 U.S. at 405, against the "unique circumstances of this case," *Raucci v. Town of Rotterdam*, 902 F.2d 1050, 1055 (2d Cir. 1990), and found that pendent jurisdiction should have been exercised.

Newport improperly posits the principles of pendent jurisdiction as inflexible and mandatory rules, engaging in the "conceptual approach" this Court cautioned against in *Rosado*, 397 U.S. at 405.[6] Newport also ignores the numerous decisions of various circuits that have found that district courts had abused their dis-

[6] Indeed, in seeking reversal of the Fifth Circuit, Newport wants this Court either to impose a *per se* rule that pendent jurisdiction shall not be exercised whenever all federal claims have been disposed of prior to trial, or to re-weigh the specific facts and circumstances in this case. The former is clearly improper under *Gibbs* and *Carnegie-Mellon*, whereas the latter would be a waste of this Court's resources.

cretion in not exercising pendent jurisdiction, *see, e.g.*, *Caserta v. Village of Dickinson*, 672 F.2d 431, 433 (5th Cir. 1982) (district court abused its discretion by dismissing "extensively litigated and briefed" state law claims after trial on federal claims); *Brown v. Knox*, 547 F.2d 900, 903 (5th Cir. 1977), *cert. denied sub nom. Knox v. Brown*, 432 U.S. 906 (1977) (district court abused its discretion by dismissing "not particularly complex" state law claims); *Sparks v. Hershey*, 661 F.2d 30, 33 (3d Cir. 1981) (district court misused discretion to dismiss pendent claims without "persuasive, reasoned elaboration"); *Knuth v. Erie-Crawford Dairy Cooperative Association*, 395 F.2d 420, 427 (3d Cir. 1968) (district court "lacked an acceptable basis for exercising its discretion" to not retain pendent jurisdiction despite an "insubstantial" federal claim); and *Cooley v. Pennsylvania Housing Finance Agency*, 830 F.2d 469, 476 (3d Cir. 1987) (abuse to dismiss time-barred state law claims where plaintiff initially chose state forum, but claims were removed).

Besides ignoring the inherent "flexibility" of pendent jurisdiction, as this Court pointed out in *Carnegie-Mellon*, 484 U.S. at 350, Newport attempts to create a conflict where none exists by overstating the holding of *Rice v. Branigar Organization, Inc.*, 922 F.2d 788 (11th Cir. 1991). In *Rice*, the Eleventh Circuit summarily found the district court had not abused its discretion by dismissing state law claims after granting summary judgment on the federal claims. 922 F.2d at 792. The *Rice* court did not discuss the *Gibbs* factors of judicial economy, convenience, or fairness to the litigants, but merely noted the discretionary nature of pendent jurisdiction, made the gratuitous observation that discretion could be abused "under these circumstances only by dismissing the pendent claims when no state forum is available," and held there was no abuse of discretion. *Id.* The dictum that discretion could "only" be abused in those circumstances if no state forum was available is attrib-

uted by the court, without any signal, to *Ray v. Tennessee Valley Authority*, 677 F.2d 818 (11th Cir. 1982), *cert. denied*, 459 U.S. 1147 (1983). *Rice*, 922 F.2d at 792.

However, *Ray* offers absolutely no support for the dictum in *Rice* and no rational basis appears for its citation as direct authority. *Ray* simply engages in a garden-variety discussion of the elements of pendent jurisdiction, finding no abuse of discretion in the district court's refusal to exercise pendent jurisdiction over a defamation claim by a former TVA employee after granting summary judgment on the ostensible federal claims of breach of employment contract and violation of reemployment rights. 677 F.2d at 825. The *Ray* court does not consider or discuss the availability of a state court and does not even intimate that a district court could "abuse" its discretion only if no state court were available.

Newport's proffered "conflict" is nothing but an unwarranted construction of an unsupported dictum. Indeed, the *Rice* court merely found that in the particular circumstances of that case, no abuse of discretion had occurred; whereas here, the Fifth Circuit found that under the unique circumstances of this case, which are very different from those apparent in *Rice*,[7] an abuse of discretion had occurred. No conflict exists where the courts explore different sides of the same coin.

Newport also makes the misleading statement that "until the ruling here, no circuit court had held that a district court 'must exercise jurisdiction over pendent state claims whenever there have been lengthy pretrial proceedings.' *Danner v. Himmelfarb*, 858 F.2d 515, 524 (9th Cir. 1988), *cert. denied sub nom. Davis v. Himmelfarb*, 490 U.S. 1067 (1989)." Newport's Petition at 9.

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[7] The *Rice* opinion contains no reference to or analysis of the amount of resources of the court and the parties utilized in that case, in stark contrast to the record cited by the Fifth Circuit in the instant case. *Newport*, 941 F.2d at 307-08.

First, the full quote from *Danner* begins, "These cases, however, do not hold that the district court . . ." 858 F.2d at 524. *Danner* does not make the statement Newport forces from it above. Additionally, Newport is also grossly mistaken in alleging that the Fifth Circuit has held here that "*whenever* there have been lengthy pretrial proceedings," a district court must exercise pendent jurisdiction. (Emphasis added.) Newport's Petition at 9. Rather, the Fifth Circuit simply held that here, where "four years of litigation produced 23 volumes and thousands of pages of record, the preparation of a pretrial order exceeding 200 pages, over a hundred depositions, and . . . nearly two hundred thousand pages of discovery production, the declining to hear this case on the eve of trial constituted an abuse of the trial court's discretion." *Newport*, 941 F.2d at 307. The Fifth Circuit has clearly not announced a *per se* rule requiring district courts to exercise pendent jurisdiction every time there are lengthy pretrial procedings.

Newport's citation of cases such as *Berg v. First State Ins. Co.*, 915 F.2d 460 (9th Cir. 1990), and *Lovell Mfg. v. Export-Import Bank*, 843 F.2d 725 (3d Cir. 1988), in which other circuits found no abuse of discretion when a district court declined to exercise pendent jurisdiction even though the parties and court had devoted substantial resources to the case, is beside the point: none of those cases involves facts like those in the instant case. Moreover, as the cases previously cited by Sears demonstrate, there is also case law in which a district court's refusal to exercise pendent jurisdiction *was* held to be an abuse of discretion, underscoring the fact that each case is controlled by its particular facts and circumstances. Even in *Berg* and *Lovell*, the district courts engaged in an application of discretion and the circuit courts reviewed that discretion. Newport's contention that the Fifth Circuit has in effect made the exercise of pendent jurisdiction mandatory is blatantly incorrect

and flatly ignores the review of discretion allowed circuit courts.

CONCLUSION

The Fifth Circuit's finding of an abuse of discretion is plainly warranted by the law of pendent jurisdiction as set forth by this Court and the circuits, and as applied by the Fifth Circuit to the specific facts of this case. Newport is unable to point to any true conflict with other circuits, and therefore in effect seeks to have this Court re-weigh the specific facts that led the Fifth Circuit to conclude that the district court had abused its discretion in declining to exercise pendent jurisdiction in this case. Sears respectfully submits that Newport's petition seeks only to further Newport's attempts at forum shopping and raises no significant legal issues for this Court to decide. The petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3559

NEWPORT LIMITED, A Partnership in Commendam,
Plaintiff-Appellee-Cross-Appellant.

versus

SEARS, ROEBUCK AND CO.,
Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

(CA 86 2319 K)

(July 10, 1991)

Before REAVLEY, POLITZ and JOLLY, Circuit Judges.

PER CURIAM: *

Conscious of judicial and legal costs and delays and with due consideration for the interests of justice and

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

judicial economies, state and federal, we render forthwith the following rulings and direct immediate issuance of the mandate:

1. The judgment of the district court rejecting complainant's RICO demand is AFFIRMED; and

2. The judgment of the district court declining to resolve the state law claims is REVERSED and the matter is REMANDED for further proceedings.

The rulings on all other issues raised on appeal are reserved and shall be made when the court assigns its reasons for the foregoing rulings.

AFFIRMED in part: REVERSED in part.

(3)

No. 91-1044

In The

Supreme Court of the United States

October Term, 1991

NEWPORT LIMITED,
A PARTNERSHIP IN COMMENDAM,

Petitioner,

versus

SEARS, ROEBUCK AND CO.,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

A. There Is a Conflict Among the Circuits 1

B. Novel Issues of State Law Exist and Comity Requires that State Courts Adjudicate Those Issues 5

C. Newport's Decision to Proceed in State Court Is Entitled to Deference 7

D. Sears Mischaracterizes the State Court Discovery 8

E. The Duration of Federal Jurisdiction Is Not Significant 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Berg v. First State Ins. Co., 915 F.2d 460 (9th Cir. 1990) 2

Brill v. Catfish Shaks of America, Inc., 727 F. Supp. 1035 (E.D. La. 1989) 6, 7

Brown v. Knox, 547 F.2d 900 (5th Cir.), *cert. denied*, 432 U.S. 906 (1977) 4

Carden v. Arkoma Associates, 494 U.S. 185 (1990) 7, 9

Caserta v. Village of Dickinson, 672 F.2d 431 (5th Cir. 1982) 4

Cooley v. Pennsylvania Housing Finance Agency, 830 F.2d 469 (3d Cir. 1987) 3

Danner v. Himmelfarb, 858 F.2d 515 (9th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989) 2, 4, 5

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989) 9

Huffman v. Hains, 865 F.2d 920 (7th Cir. 1989) 4

Knuth v. Erie-Crawford Dairy Cooperative Association, 395 F.2d 420 (3d Cir. 1968) 4

L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414 (11th Cir. 1984) 3

La Buhn v. Bulkmatic Transport Co., 865 F.2d 119 (7th Cir. 1988) 3

Lovell Mfg. v. Export-Import Bank of U.S., 843 F.2d 725 (3d Cir. 1988) 2, 4

Moor v. County of Alameda, 411 U.S. 693 (1973) 5, 7

Newman v. Burgin, 930 F.2d 955 (1st Cir. 1991) 3

TABLE OF AUTHORITIES – Continued

Page

Newport Limited v. Sears, Roebuck & Co., 739 F. Supp. 1078 (E.D. La. 1990) 6

O'Brien v. Continental Ill. Natl. Bank and Trust Co., 593 F.2d 54 (7th Cir. 1979) 3

Piper Aircraft Co. v. Reyno, 450 U.S. 909 (1981) 7

Rice v. Branigar Organization, Inc., 922 F.2d 788 (11th Cir. 1991) 2

Schneider v. TRW, Inc., 938 F.2d 986 (9th Cir. 1991) 3

Smith v. Cooper/T. Smith Corp., 850 F.2d 1086 (5th Cir. 1988) 9

Sparks v. Hershey, 661 F.2d 30 (3d Cir. 1981) 4

Super Valu Stores, Inc. v. Peterson, 506 So. 2d 317 (Ala. 1987) 6

United Mine Workers v. Gibbs, 388 U.S. 715 (1966) 3

MISCELLANEOUS:

Note, "The New Business Rule and the Denial of Lost Profits: Men Keep Their Promises When Neither Side Can Get Anything by the Breaking of Them", 48 *Ohio St. L. J.* 855 (1987) 5

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NEWPORT LIMITED,
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SEARS, ROEBUCK AND CO.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

Newport Limited, A Partnership in Commendam ("Newport") submits this reply brief to respond to certain arguments raised by Sears, Roebuck and Co. ("Sears") in its Brief of Respondent In Opposition To Petition For a Writ of Certiorari ("Sears' Opposition Brief").

ARGUMENT

A. There Is a Conflict Among the Circuits

It is difficult to fathom Sears' assertion that the Fifth Circuit's decision does not conflict with decisions of the

other circuits. For example, the Ninth Circuit found that "the proper exercise of discretion *requires* the dismissal of state claims" once the federal claim has been dismissed on summary judgment, even after substantial litigation. *Berg v. First State Ins. Co.*, 915 F.2d 460, 468 (9th Cir. 1990) (emphasis supplied); *see also Rice v. Branigar Organization, Inc.*, 922 F.2d 788, 792 (11th Cir. 1991) ("district court can abuse its discretion under these circumstances *only* by dismissing the pendent claims when no state forum is available") (emphasis added); *Danner v. Himmelfarb*, 858 F.2d 515, 524 (9th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989) ("[although] in some of our cases we have said that because of lengthy pretrial proceedings, it was not an abuse of discretion to retain jurisdiction over state claims after the federal claim has been dismissed . . . [t]hese cases . . . do not hold that the district court *must* exercise jurisdiction over pendent state claims whenever there have been lengthy pretrial proceedings") (emphasis added; citations omitted); *Lovell Mfg. v. Export-Import Bank of U.S.*, 843 F.2d 725, 735 (3d Cir. 1988) ("absent 'extraordinary circumstances,' a district court in this circuit is powerless to hear claims lacking an independent jurisdictional basis, and 'time already invested in litigating the state cause of action is an insufficient reason to sustain the exercise of pendent jurisdiction' ") (citation omitted). A conflict exists, and the grant of certiorari is necessary to provide uniformity among the circuits.

No other appellate court has found that judicial economy alone is enough to reverse a district court's decision declining jurisdiction over purely state law claims. Only in instances when the claim would be time barred in state court has any appellate court held that a district court

must exercise its jurisdiction. *See, e.g., Cooley v. Pennsylvania Housing Finance Agency,* 830 F.2d 469 (3d Cir. 1987); *L.A. Draper & Son v. Wheelabrator-Frye, Inc.,* 735 F.2d 414 (11th Cir. 1984); *O'Brien v. Continental Ill. Natl. Bank and Trust Co.,* 593 F.2d 54 (7th Cir. 1979). Nonetheless, even under those circumstances, if the district court is uncertain whether the claim may be time barred, dismissal is not an abuse of discretion. *Newman v. Burgin,* 930 F.2d 955, 965 (1st Cir. 1991).

Those other circuits adhere to the principle of *United Mine Workers v. Gibbs,* 382 U.S. 715 (1966). The black letter rule in *Gibbs* is that, when a district court dismisses all the federal claims before trial, it *should* also dismiss the pendent state law claims. *Id.* at 726. Only under limited circumstances is dismissal of pendent claims not required. For example, if judicial economy would be served, then the court *may* retain jurisdiction over the state law claim. *See, e.g., Schneider v. TRW, Inc.,* 938 F.2d 986 (9th Cir. 1991). Such cases stand for the proposition that a district court will not be reversed on appeal if it retains the state law claims because of such extenuating circumstances; however, that proposition is a far cry from stating that a district court *must* retain jurisdiction solely on the ground of judicial economy. *See, e.g., La Buhn v. Bulkmatic Transport Co.,* 865 F.2d 119, 123 (7th Cir. 1988) ("This is not a case like *Graf* where the correctness of the defense was clear at a glance, so that refusing to decide it in federal court was merely postponing the inevitable. Even in that case we did not suggest that the district judge was *obliged* to retain jurisdiction – we merely upheld his decision to do so") (emphasis in original).

Sears cites several cases which purportedly provide that a district court abuses its discretion when it dismisses pendent state law claims if the federal claim is dismissed before trial. Not one of those cases is on point. In *Caserta v. Village of Dickinson*, 672 F.2d 431 (5th Cir. 1982), the court wrongfully dismissed the state claims *after a trial*. In *Knuth v. Erie-Crawford Dairy Cooperative Association*, 395 F.2d 420 (3d Cir. 1968), the appellate court revived the dismissed federal claim and therefore also revived the state law claims. Similarly, in *Brown v. Knox*, 547 F.2d 900 (5th Cir.), *cert. denied*, 432 U.S. 906 (1977), and *Sparks v. Hershey*, 661 F.2d 30 (3d Cir. 1981), although the district courts abused their discretion by declining to exercise jurisdiction, the federal claims were viable and had not been dismissed, and the state claims arose from the same nuclei of operative facts.

Here, in finding an abuse of discretion, the Fifth Circuit did nothing more than simply substitute its judgment for that of the district court. Other circuits, by contrast, afford the highest degree of deference to a district court's *relinquishment* of jurisdiction. As the Seventh Circuit declared: "[T]he district court's discretion to *relinquish* pendent jurisdiction [is] 'almost unreviewable' " *Huffman v. Hains*, 865 F.2d 920, 923 (7th Cir. 1989) (emphasis in original); *see also Danner v. Himmelfarb*, 858 F.2d 515 (9th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989) and *Lovell Mfg. v. Export-Import Bank of U.S.*, 843 F.2d 725 (3d Cir. 1988). The rule in other circuits is – and in every circuit should be – that a district court can abuse its discretion when it declines to exercise pendent jurisdiction after dismissing the federal claims only if no state forum is available to the plaintiff.

B. Novel Issues of State Law Exist and Comity Requires that State Courts Adjudicate Those Issues

This Court has expressly held that a district court may refuse to exercise pendent jurisdiction if, among other things, that court would have " 'to resolve difficult questions of [state] law upon which state court decisions are not legion.' " *Moor v. County of Alameda*, 411 U.S. 693, 715-16 (1973) (citation omitted). Sears argues that the district court in this case need not decide any novel issue of state law and that the Fifth Circuit's decision therefore does not undermine the principle of comity. Sears is mistaken.

First, comity is served *whenever* a state court is allowed to preside over state law claims, whether or not the state law claims raise novel issues. *See, e.g., Danner v. Himmelfarb*, 858 F.2d 515, 524 (9th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989) ("[Plaintiff] does not dispute, nor could he, that principles of comity will be well-served by allowing the state courts to resolve claims solely of state law.").

Second, this case does involve novel issues of state law. Newport, for example, has asserted a claim for lost profits for a new business that lacks a history of operations. Many jurisdictions bar such claims under the "new business" rule. According to this rule, a business with no history of profitable operations cannot, as a matter of law, prove lost profits with reasonable certainty. *See, e.g.*, Note, "The New Business Rule and the Denial of Lost Profits: Men Keep Their Promises When Neither Side Can Get Anything by the Breaking of Them," 48 *Ohio St. L. J.* 855 (1987). Sears contends that Louisiana law is to the same effect. Newport believes that Louisiana will follow

the emerging majority view that rejects the new business rule, "particularly where the defendant itself has wrongfully prevented the business from coming into existence and generating a track record of profits." *Super Valu Stores, Inc. v. Peterson*, 506 So. 2d 317, 330 (Ala. 1987). Because Newport's claim for lost profits is approximately $40 million, the issue has been hotly contested.[1] The issue raises concerns critical to many commercial disputes in Louisiana, is purely one of state law, and should be adjudicated in state court.

Sears' reliance on *Brill v. Catfish Shaks of America, Inc.*, 727 F. Supp. 1035 (E.D. La. 1989), illustrates why the Fifth Circuit erred and why a "surer-footed reading of applicable law" in state court is important. The dispute in *Brill*, like the dispute here, concerned the breach of an implied covenant of good faith and fair dealing under the Louisiana Civil Code. The court's jurisdiction was based on diversity of citizenship and, thus, the court was *required* to decide what it considered a difficult and unsettled question of state law:

> The term "good faith" is not defined in the Civil Code articles on obligations. Louisiana courts provide little guidance as to when conduct in the contractual setting violates the implied covenant of good faith.

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[1] Although Sears quotes extensively from the district court's comments regarding Newport's claims for damages, Sears fails to advise the Court that those comments focused on RICO damages and, more specifically, on RICO "injury", not on damages for lost profits under Louisiana law. *Newport Limited v. Sears, Roebuck & Co.*, 739 F. Supp. 1078, 1082 (E.D. La. 1990).

Id. at 1040. The district court in *Brill* had to decide an unsettled issue of state law because it had no choice but to make such a determination. Under this Court's decision in *Moor,* however, no district court should be forced to make such a determination when no independent ground for jurisdiction exists.

C. Newport's Decision to Proceed in State Court Is Entitled to Deference

In general, great deference should be given to a plaintiff's choice of forum. *Piper Aircraft Co. v. Reyno,* 450 U.S. 909 (1981). Sears nonetheless accuses Newport of "seeking to enlist the aid of the Court in furtherance of Newport's forum shopping and recently-acquired preference to have a state court decide its claims." Sears' Opposition Brief at 2. This accusation lacks merit.[2] If *Carden v. Arkoma Associates,* 494 U.S. 185 (1990), had been decided prior to the institution of this lawsuit, Newport would have filed in state court. At the time Newport brought this suit, however, diversity jurisdiction existed under the controlling law of the Fifth Circuit. Thus, had Newport filed in state court, Sears would have removed the case to federal court. By initially filing in federal court, Newport sought to save time, money, and judicial resources by avoiding the unnecessary complication of Sears removing the case. Sears also wholly ignores Newport's legitimate

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[2] In its brief, Sears alleges that counsel for Newport characterized the district court as a "hostile forum" during oral argument. Sears' Opposition Brief at 9. No such statement was made.

desire to have its state law claims given a "surer-footed reading under" by a state court.

D. Sears Mischaracterizes the State Court Discovery

Sears tries to discredit Newport's assertion that there will be no duplicative discovery in state court. Sears claims that, because the state court did not accept all discovery orders made by the federal court, Newport will now engage in redundant discovery. Sears neglects to mention that, apart from a limited set of discovery requests, the only discovery Newport has sought to take in the state court proceeding has been videotaped depositions of certain key officers and agents of Sears that Sears refuses to make available at trial and that are beyond the subpoena power of the court. To imply that these video depositions are duplicative or improper is misleading given that the depositions would be unnecessary but for Sears' refusal to make the witnesses available at trial. Newport is otherwise ready to proceed to trial and has requested an early trial date from the state court.[3]

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[3] Sears also misleads this Court by insinuating that Newport did not immediately institute state court proceedings because Newport did not serve Sears for four months. Sears Opposition Brief at 3. Newport instituted the state action within two weeks of the federal court's dismissal. While Newport did not serve Sears until September 5, 1990, such service was unnecessary and pointless – Sears *removed* the state court action two weeks after it was brought. That removal, of course, was frivolous. The federal district court properly sanctioned Sears and remanded the proceeding to state court.

E. The Duration of Federal Jurisdiction Is Not Significant

Sears attempts to buttress its argument that the district court improperly relinquished jurisdiction by stressing the length of federal proceedings.[4] Not counting the year that the stay was in effect, however, the federal court had jurisdiction under *Carden* for no more than five months. For the first two years, jurisdiction was founded solely on diversity of citizenship. In November 1988, Newport amended its complaint to add a claim under RICO. Within five months, because of the unsettled state of RICO law, the district court stayed *all* proceedings pending resolution of the issues in *Smith v. Cooper/T. Smith Corp.*, 850 F.2d 1086 (5th Cir. 1988), which was held in abeyance pending a decision by this Court in *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). Before the stay here was lifted, this Court decided *Carden*, and, then, what had been the basis for diversity jurisdiction ceased to exist. Shortly thereafter, the district court dismissed the RICO claim. The pendent claims were dismissed at the same time, after the entire case had lain dormant in the trial court for more than a year. Consequently, although the case may have been before the district court for several years, the court had proper jurisdiction over active litigation for only a few months.

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[4] Sears attempts to dissuade the Court from granting Newport's petition by suggesting that the Fifth Circuit's decision is fact driven. Assuming, *arguendo*, the facts as stated by Sears, the Fifth Circuit's decision is legally unsupportable. A district court should not be forced to retain pendent jurisdiction after all federal claims are dismissed prior to trial, unless no state forum is available.

CONCLUSION

Grounding its decision solely on judicial economy, the Fifth Circuit has ruled that the district court cannot relinquish jurisdiction over state law claims even though all federal claims have been dismissed. No other appellate court has so held and, in fact, other circuits require a district court to relinquish jurisdiction under such circumstances. The Fifth Circuit's decision constitutes an unwarranted and improper attack on the adjudicatory power of state courts.

Respectfully submitted,

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